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THE SYMBIOTIC CIRCLE OF COMMUNITY: A COMPARATIVE INVESTIGATION OF DEVIANCE CONTROL IN INTENTIONAL COMMUNITIES

ZACHARY ROTHENBERG¹

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I. INTRODUCTION

Imagine a very large circle on a two-dimensional plane. We will call this circle the world. Imagine within this very large circle millions of other, overlapping circles, each a different color, with varying sizes and degrees of intensity, or brightness. Now imagine that each of these many circles is a self-acknowledged group of people, bound by some collective identity or commonality of belief or purpose. At the circumference of each circle is a boundary, pushing members inwards towards the core, while limiting intrusion from without. The size of each circle is determined by the number of people who feel a part of that group. The brightness of each circle is determined by the intensity with which those people feel connected to each other, and the degree to which their identities are formed by membership in that group. No circle is of precisely the same color. A single circle may be as small and bright as a close-knit family; likewise, a circle may be as large (and likely dull, or un-bright) as an entire nation, or even the entire world. A single person may simultaneously be in numerous circles of varying brightnesses (thus the overlapping), but, one imagines, it would seem there is a finite amount of brightness a single person could exude without feeling “over-committed”. Thus, in the aggregate, the more people that belong to numerous circles, the larger and less bright those circles become.

It would seem a bit ridiculous to label each of these circles a community—at their least bright, some of these circles might represent people with the same long-distance telephone service, or who share the same favorite flavor of ice cream. Yet, it is difficult to distinguish a non-community-circle from a circle that would more commonly be considered a community. Is it a matter of size? Of brightness? Both? For now it will suffice to recognize that at some point along the dual continuums of size and brightness, these circles become recognizable communities. Accordingly, we might say that each of these circles is a *potential* community.

Now, think of this view of the two-dimensional, very large circle, with millions of overlapping circles within it, as simply the top layer of a three-dimensional tube. Just like the very large circle, each of the smaller circles is just the top of a long tube that extends beneath the plane. Turn the plane ninety degrees in your mind, so that the tubes are extending sidelong, rather than vertically. This three-dimensional object now shows a continuum of time, and each tube expresses a circle (a potential community) as it extends over time. We will see that the tubes grow and shrink in size with the numbers of “members” feeling a belonging to those potential

communities. And we will see that the brightness of the tubes will increase or diminish over time as well. For example, we could focus in on one particularly large tube representing the United States of America: we could watch it increasingly grow in size as this nation's population has grown, and we could watch its brightness increase, for example, with the heightened patriotism of the World Wars, and decrease again soon after. Looking within the U.S.-tube to discover the tube representing, for example, the American Jewish community, we could watch as that tube increased dramatically in both size and brightness during the 1920s, remaining bright for some time as most members of that community lived and worked closely together in a small number of urban ghettos, and then beginning to lose its brightness over time as members of the community began to assimilate (to expend more and more of their tube-brightness on other potential communities). Likewise, we could see the very large, outermost tube (the potential "global community") grow steadily in size and become brighter over the last century, with globalizing improvements in transportation and communication.

Social critics have expressed concern of late that, for example, with global communication and transportation at our fingertips, and with increased emphasis on the workplace, our tubes, though perhaps having increased in number, have diminished in brightness.² As the brightnesses of the circles are reduced—due to both increased circle size and increased overlapping with other circles—the circles themselves begin to dissipate. It is this circle dissipation that leads these critics to lament the loss of community in America. They seem to long for an earlier day, where people felt connected to fewer and smaller, but brighter tubes. They conjure images of a small village, separated by miles from any other village, in which a small and homogenous group of people lived, worked, played, and prayed together, without interference from the outside world. They seem to suggest that today's cross-section of the community-tube model would reveal much larger and more frequently overlapping tubes, each with a far lesser brightness than in cross-sections of past eras. This does not seem like an inaccurate depiction or an unreasonable concern. Yet, I believe that it is at least something of an exaggeration to look at today's cross-section and say that we are without community—that we are "bowling alone."

It is my belief that there are communities out there—communities that are significant in people's lives. This paper will attempt to show that the village-style communities that these critics have idealized, while in their most literal form perhaps not as common, are indeed analogous to the others that they discount from today's America. I will endeavor to show that, while in many instances their forms and functions may have changed, bright circles of community do exist in America. In examining some of these circles, then, my method will be to look both to the core of the community and to its outer perimeter. We shall see, in fact, that these two parts of the circle are in a symbiotic relationship, each one both relying on and providing for the other. We shall see how the core values and purposes at the heart of a community inform the social control mechanisms at its perimeter. Likewise, we shall see how a community's social control functions—the two-way street that both

²See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

compels conformity within and prevents infiltration and dilution from without—perpetuates and reaffirms the values and purposes of the community.

In Section I, I will consider two extreme examples of community (the Oneida Community of the 19th Century and the Old Order Amish). These are communities both highly cohesive and highly isolated—they are extremely bright tubes with sharply delineated circumferences. In Section II, I will discuss a more mainstream example, Residential Community Associations, which, unlike the communities of Part I, represent a much more particular and individualistic notion of community. Section III will consider the community of Harvard College students, which forms an interesting blend of the tight-knit and life-encompassing nature of the Section I communities and the individualistic nature of Residential Community Associations. In Section IV, I will briefly explore, in light of the first three sections, the dangers and limits of communities, and propose a series of factors that ought to contribute to any State decision whether to interfere.

With each community considered, I will try to paint a picture of the many collectivizing factors at work, from the perspective of both the individual members (or potential-members) and the community as a whole: (1) the history or tradition of the community; (2) its underlying ideology, belief and value systems, and/or common interests or goals; (3) the nature of its communalism; (4) the nature of its isolation from the outside world; and (5) its decision-making and governance structure. Finally, I will look to its “gate-keeping” or circumference-drawing functions—how the community controls deviance and maintains unity within, while distinguishing itself from the chaos without. I hope with each community to shed some light on both its conceptions of “deviance” and the calculus likely at work in any individual member’s decision whether to deviate. Through these several juxtapositions of community features, I will show that where there is a collective effort to control deviance—to conform behavior to collectively perceived and understood norms, and to remove or exclude those whose behavior conflicts with these norms—there must also be a community of shared beliefs, values, and/or goals feeding, and being fed by, those efforts.

II. SECTION I

The three communities in this first section represent extreme examples of community. Even the most skeptical critic would be hard-pressed to deny that these communities are as cohesive, if not more so, than those communities of old that they tend to idealize. It is not at all my intention in this first section to argue the mere existence of these communities, for that is no doubt quite obvious. Rather, this section is meant to provide a baseline of comparison for the following two sections.³ With this goal in mind, it is perhaps useful to generalize briefly about the commonalities of these two communities. In placing these communities within the three-dimensional tube-world model described above, both may be envisioned, in comparison to other, less extreme communities, as particularly small in diameter, extremely bright, highly discrete (with few other community-circles overlapping), and having strong perimeter borders. In other words, these two communities (1) include relatively small numbers of people; (2) include members who feel extremely

³It is for this reason that I feel comfortable including the no-longer-existent Oneida Community.

connected to each other, and who consider the community an extremely significant component of their individual identities; (3) are particularly isolated—physically or otherwise—from outsiders; and (4) based on the first three characteristics, have strong mechanisms for social control.

Before proceeding with accounts of these communities, however, a brief theoretical interlude seems appropriate. Throughout this paper, the several communities will be compared on a number of levels. Some—size, location, etc.—will be quite obvious. Others—levels of isolation and communalism, underlying beliefs and values—will be less obvious. In examining many of these less obvious features, I will often refer to two interconnected distinctions: (1) the difference between *gemeinschaft* and *gesellschaft* relations, and (2) the difference between instrumental, affective, and moral orientations. The first of the two distinctions focuses on types of relations that predominate between community members.⁴ This distinction is a tool for examining the nature of the community as a whole. The paradigmatic example of *gemeinschaft* relations is a family—“non-rational” relations based on emotion and affection. *Gesellschaft* is most easily depicted as a corporation—“rational” relations based on mutual understanding and external goals. No community can exist solely in one of these two realms: a family cannot live peacefully under one roof without deciding who will take out the trash and who will do the dishes; likewise, a corporation cannot prosper where there are no positive interpersonal relations to bring to the conference table. But while it may be true that any functional community must have both these types of relations, one can compare communities and discover that they do not necessarily present the same balance with respect to these two types of relations.

The second comparative spectrum aims to distinguish instrumentality, affectivity and morality as foci of individual orientations towards a social system.⁵ Where the *gemeinschaft/gesellschaft* distinction is concerned with the nature of the community as a whole, these three orientations should be understood from the perspective of the individual member or potential member. Where the *gemeinschaft/gesellschaft* helps to answer the question “What is this community like?”, this second spectrum helps us understand why individuals do or do not feel committed to the group. An instrumental orientation focuses on “the rewards and costs that are involved in participating in the system.”⁶ It is the cognitive approach of calculating what the individual, as an individual, might gain or lose by joining one particular community rather than another. An affective approach emphasizes emotional connections between individuals within the community. Finally, the moral orientation is an evaluative approach concerned with the degree to which the moral norms and collective beliefs and/or goals of a given community jibe with those of the individual. Just as with the *gesellschaft/gemeinschaft* distinction, here too a

⁴The *gemeinschaft/gesellschaft* distinction is one with a long history in the field of sociology. Its origins and first uses are generally attributed to early social theorists Ferdinand Toennies, Max Weber, and Emile Durkheim.

⁵This trio was put forward by Rosabeth Moss Kanter, in her seminal work on American communes and the bases for members’ commitment to them. ROSABETH MOSS KANTER, *COMMITMENT AND COMMUNITY: COMMUNES AND UTOPIAS IN SOCIOLOGICAL PERSPECTIVE* (1972).

⁶*Id.* at 68.

combination approach must be used in comparing one community (or, more accurately, the orientations of the individual members comprising a community) to another. Yet, also as with the *gesellschaft/gemeinschaft* distinction, communities vary in the degrees to which each of these orientations are present and acknowledged. The decision whether to join one type of community will draw on a quite different set of issues and concerns that will affect the decision whether to join another type of community. Thus, where a decision whether to take a job flipping burgers or as an investment banker (and thus to join one or the other community of employees) would likely draw most heavily on instrumental issues (though perhaps with some consideration of affective and moral issues as well), the decision to join one religious congregation over another would probably be informed more heavily by affective and moral considerations than by instrumental ones.

In looking at these two sets of distinctions together, there is an intuitive sense that the instrumental orientation maps onto the *gesellschaft* and the affective orientation is paired with the *gemeinschaft*. In other words, it would seem that, in a community in which *gesellschaft* relations predominate, an individual member's commitment to the group is likely to be based primarily on instrumental considerations; likewise, intuitively one suspects that, within a *gemeinschaft*-dominated community, individual commitment is probably rooted in an affective orientation. While this intuitive pairing may in many instances be accurate, two qualifications must be made. First, as discussed briefly above, in looking at these two spectrums, it is vital to appreciate that they are not concerned with precisely the same descriptive functions. The *gemeinschaft/gesellschaft* distinction aids in describing the community as a whole: it indicates the role of a given community and the aggregate nature of the interpersonal relations among its members. Is the community focussed like a corporation on the completion of certain tasks? Or, more like a family, are the relations between the individual members the essential element of the community? The instrumental/affective/moral spectrum, on the other hand, describes the nature of individual members' commitment to the group. What issues would a member deciding whether to desert the community consider in her decision? What desires or needs would prevent a member from leaving, or make a potential member decide to join?⁷

Second, though the intuitive mapping of affectivity onto *gemeinschaft* and instrumentality onto *gesellschaft* may often be accurate, some types of communities do defy this matching. For example, individual commitment to a *gemeinschaft*-dominated community of participants in group therapy is likely as much, if not more,

⁷It is in asking this individually-focussed question regarding the nature of membership commitment to the group that the element of morality comes in. Though morality does not map neatly onto either the *gemeinschaft* or *gesellschaft*, it is nonetheless often a significant factor in a person's calculus when deciding whether to join or to quit a community. In the Section I communities, the moral orientation is in predominant part focussed on the religious origins and natures of the two communities. In non-religious communities, as we shall see in regards to the Residential Community Associations in Section II, the moral orientation would likely focus not necessarily on beliefs, but perhaps rather on collective goals or purposes. It is surely not my intention in this paper to evaluate the respective moralities or moral bases of the communities considered herein. Yet, in order to understand the relation between these communities and their respective social control functions, we must in part be concerned with members' conceptions and levels of acceptance of the moral nature of the respective communities.

instrumentally-oriented than affectivity-oriented. Though the community of group therapy is far more appropriately defined by the family-like *gemeinschaftian* functions, an individual's decision to participate is likely informed as much by an instrumental desire for the individual benefits that therapy might grant as by affective orientations. With this example we see an instance where the informal, interpersonal (i.e. *gemeinschaft*) nature of a community enjoys and relies on an individualistic, instrumental basis for commitment. These two qualifications will become important to this paper as we begin to examine the relations between the natures of various communities and their respective methods of controlling deviance. Where *gemeinschaft/gesellschaft* will consider from a group perspective the natures of the communities, the spectrum of orientations will be concerned with understanding individual members' commitment to the group and the nature of their decisions (conscious or otherwise) whether to deviate from the collective norms and behaviors of those groups.

A. The Oneida Community

1. Brief History

The Oneida Community was one of a number of efforts during the 19th Century to escape the increasing industrialization in America. It was the creation of a single man, John Humphrey Noyes. Born in Vermont in 1811, after a brief stint at a law firm and two years at theological seminaries, Noyes set out to create a community in which people would be free to reach their spiritual and moral potential. A variation on what was known as Christian Perfectionism, Noyes' belief was that Christ had already returned to the world, "so that redemption or liberation from sin was an accomplished fact."⁸ Thus, if he could create the right environment, free from the stresses and corruptive elements of American society, people could lead lives of perfection, free from sin. Though his evangelistic efforts were great, membership grew slowly. By 1844, he had established a small community of about two dozen adult members at Putney, Vermont. As word of the community, and its less-than-traditional ways, spread through northern Vermont, it was met with greater and greater resentment and contempt. To escape, in 1847 Noyes and his community fled to Oneida, New York. Once at their new home, Noyes set out to create the type of community he believed would be conducive to the existence of an earthly perfection. He emphasized two fundamental principles in applying his Perfectionistic Christianity to daily life: the possibility of individual perfection and communal living.⁹

⁸WILLIAM M. KEPHART, EXTRAORDINARY GROUPS 94-95 (1982).

⁹The Community at Oneida was to prosper for another thirty years. As their notoriety grew, so too did the pressure from outside forces, much as it did in the Putney years, against their "un-American" practices. Simultaneously, internal conflict grew as well, from two primary sources. First, the Community suffered a burst of deviant behavior and opposition sentiment from the second generation of Oneidans, who were born into the Community, rather than affirmatively choosing to join. The second source of conflict stemmed from a new member, James W. Towner, whose own charismatic leadership rivaled Noyes' and inspired a divisive minority of members to emerge. [Interestingly, Barbara Fishbein argues that the basis of the dissension was that Towner, a lawyer, advocated the replacement of the informal social control mechanisms with legal authority. Barbara Fishbein, *Justice Without Law? Resolving*

2. Perfectionism

For the Oneidans, individual perfection and communal living were in no way exclusive; indeed, it was Noyes' belief that only through a communal existence, in which his brand of Christianity permeated every moment of daily life, could people reach perfection. As Noyes himself said, the community was not intended to "call people away from their homes and employments to attend to religion," but instead to turn "their very arrangements for getting a living into the essential conditions of a school and church."¹⁰ It would thus be everyday life, rather than specific moments in a church or in a classroom, that would nurture the spiritual growth towards perfection of the members of the Oneida Community.¹¹ As each person contributed to the overall virtue of the environment, the perfection of which, they felt, was a prerequisite for individual perfection, members' fates were thus necessarily intertwined.¹² Accordingly, in considering the other major aspects of Oneida life, it is vital to keep in mind that they were not necessarily the result solely of earthly practical considerations, but were also inspired by the community's spiritual quest for perfection.

3. Communal Life

Only through communal living, Noyes believed and taught his followers, could the people of Oneida create the type of environment that might enable them to reach perfection. This spirit of communalism would not inform simply the economic structure of the community; rather, it would permeate every aspect of life at Oneida. From group living arrangements and a community dining hall, to uniform hair styles and manners of dress, it was the goal of the Oneida to create the type of *gemeinschaft* relations and intensely affective orientation that might nurture a community-wide primary group.¹³ Even the most *gesellschaftlich* of functions, for example the

Disputes Without Lawyers, 18 HARV. C.R.-C.L. L. REV. 613, 614. (1983)] In 1877, Noyes resigned as leader of the Oneida, and two years later, in fear of possible legal charges in connection with his leadership of the Community, Noyes fled to Canada, never to return. Without his guidance and inspiration, the rigid and defining practices of the Community faded with time, and on January 1, 1881 the community was dissolved. It did not, however, cease to exist as a business. With a net worth of \$600,000, a joint-stock company was formed in the name of Oneida Ltd. In 1967, Oneida Ltd. went public on the New York Stock Exchange, where its stock is still traded. More on Oneida Ltd. may be found on the internet at <http://www.oneida.com>.

¹⁰G. W. Noyes, *Episodes in the Life of John Humphrey Noyes*, COMMUNITY QUADRANGLE, Dec. 1927, at 6.

¹¹For a more detailed understanding of the religious underpinnings of the Oneida version of Christian Perfectionism, as described by the Community itself, refer to THE ONEIDA COMMUNITY, HANDBOOK OF THE ONEIDA COMMUNITY, No. 2 (1871).

¹²This is a variation on what is sometimes called "interconnected welfare," which Mark D. Rosen defines as "the view that an individual's prospects for self-actualization are inextricably connected to how other individuals in her community behave and believe. Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1066 (1998).

¹³"A primary group is a small, face-to-face group characterized by intimate relationships and shared feelings, such as the family, the clique, the friendship circle. A secondary group,

centrally assigned and constantly shifting work duties, were communalized to inspire heightened interpersonal, *gemeinschaft* relations between members. No function within the community was purely functional; each had its own social and interpersonal function as well. Each member of the community was to think of every other member with an equal degree of attachment and identification, no single member figuring more prominently in one's mind than another.

An extreme example of this is to be found in their practice of "complex marriage." Noyes and the Oneidans believed that "it is not desirable for two persons...to become exclusively attached to each other—to worship and idolize each other—however popular this experience may be with sentimental people generally."¹⁴ Accordingly, under this institution, every member had sexual access to every adult member of the opposite sex, with special care given to ensure that no two people spent more time together than with any others. Contrary both to the popular belief of the outside world at the time and to the quite different variations instituted by the more modern communal societies of the 1960s, however, complex marriage was not "free love."¹⁵ Indeed, it was a highly regulated and monitored program, intended further to engender solidarity and subvert the possibility of special relationships considered dangerous to the spirit of a community-wide primary group.¹⁶

This effort to eviscerate the possibility of sub-groups or exclusive relationships within the community as a whole extended throughout Oneida life. Children were raised communally, and were reprimanded for showing any special affection for any other member, particularly their parents. Work assignments among the adults were changed frequently, to avoid any potential work-related exclusive relationships. Analogously, material goods were owned collectively, so that no one could acquire special affection for any object. Even spending too much time alone was frowned upon by the Community, as it indicated self-importance rather than the spirit of community. The essence of the Oneida Community was to be found in its communal spirit, and in this communal spirit, they believed, was the key to earthly perfection.

on the other hand—such as the large corporation, the business firm, or the government bureau—is characterized by an impersonality of association." KEPHART, *supra* note 8, at 99.

¹⁴THE ONEIDA COMMUNITY, HAND-BOOK OF THE ONEIDA COMMUNITY 14-15 (1867).

¹⁵It is probably more useful to think of complex marriage not along the lines of free love, but rather in comparison with the complete celibacy practiced by such of the Oneida's contemporaries as the Shakers. Thus, complex marriage among the Oneida should be thought of much as celibacy was for the Shakers, as the solution to the potential problem of exclusive relationships within the community as a whole.

¹⁶Though solidarity was the main underlying purpose behind complex marriage, Noyes took great care to cite as the basis for complex marriage passages from the Bible:

In the kingdom of heaven, the institution of marriage—which assigns the exclusive possession of one woman to one man—does not exist (Matt. 22:23-30).

In the kingdom of heaven, the intimate union, which in the world is limited to pairs, extends through the whole body of believers. . . . (John 17:21). KEPHART, *supra* note 8, at 121.

4. Isolation

That Noyes chose as the home for his community the rural and isolated nature of Oneida, New York, was no coincidence.¹⁷ After its community relations problems in Putney, the Community knew it was in its best interest to avoid any more contact than necessary with the outside world. And, as Kanter explains, “[t]he feeling of ill will was mutual.”¹⁸ After all, it was Noyes’ very purpose behind Oneida to create an atmosphere free from what he perceived as a sinful and corrupting American society. As Kanter continues, “Oneida scorned the outside world as filthy and contaminating....Oneida children were horrified by the swearing and depravity of village boys. Children were forbidden to speak to outsiders.... After visitors had left, the community gathered for a ritual cleaning ‘bee,’ to efface every trace of an ‘unclean public’ and of the ‘filthy invaders’.”¹⁹ Likewise, a special cleansing ritual was required for any member before temporarily leaving the community, and upon his or her return. Centered around the Mansion House, in which the entire community lived, the Oneida were an extremely insular community. Its collective frame of reference hardly ever extended beyond its own physical, interpersonal and psychological boundaries to the outside community, to which the Oneida tellingly referred to as “the World.” Whether intentionally or not, the intense isolation of the Oneida Community, by cutting external ties and insulating itself from the contempt of the World, further enhanced the solidarity and sense of shared values and goals of its members.²⁰

¹⁷For a telling description of the area surrounding the Community, and of the effort necessary to visit it, see *THE ONEIDA COMMUNITY*, *supra* note 11, at 3-5.

¹⁸KANTER, *supra* note 5, at 18.

¹⁹*Id.*

²⁰In discussing the effects of isolation on the solidarity of the Community, I do not intend to overlook the difficult issue of whether, in practical reality, members actually perceived themselves as free and able to quit the Community. Particularly for members who had lived at Oneida for a considerable time, and perhaps even more particularly for the later members who were born at Oneida, the decision to quit the Community surely involved the surmounting of serious obstacles. From the interpersonal (affective) ties that would be broken by departure, to the psychological and practical (instrumental) difficulties of immersion into mainstream society, to the ideological and religious (moral) ramifications of quitting Noyes’ Perfectionism, the impact of quitting the Oneida Community should not be underestimated. There is absolutely a thin line (or perhaps more precisely, none at all) between the affirmation of collective values through social pressure and isolation and the eradication of the free will of individual members. With increased isolation so too grows a member’s reliance on the Community, for interpersonal, economic and social needs. This is not a theme I will tackle squarely in this paper, but to ignore it wholly would be to leave out an essential element. Thus, I will touch on the issue, at least tangentially, throughout this paper. The key, for now, is to appreciate the issue from two different perspectives. First, as considered in the text above, is that, from a group/strategic perspective, the affective and instrumental reliance on the community that intense isolation works to heighten has a significant impact on overall membership commitment. Where ties with the outside world are cut, people are less able (and thus less likely) to leave. On the other hand, though, from an individual perspective, where there are such affective and instrumental barriers to departure from the community, there ought to be significant concerns about individual members’ rights and freedoms to make their

5. Organizational Structure

As seems intuitive, the communal nature of the Oneida Community lent itself to an egalitarian organizational and decision-making structure. With the single exception of Noyes, whose status among the Community was of a divine nature,²¹ day-to-day decisions were made democratically, with more or less equal participation from all. The Handbook of the Oneida Community describes as one of the two “measures relied upon for good government...Daily Meetings, which all are expected to attend, and in which religious, social and business matters are freely discussed...”²² Additionally, particular decisions were frequently distributed to any of the several committees formed by interchangeable mixes of members. In making these decisions, the Handbook states, “unanimity is always sought by committees, by the Business Board, and by the Community....If there are serious objections to any proposed measure, action is delayed until the objections are removed. The majority never go ahead without leaving a grumbling minority behind.”²³

Yet, while these democratic sentiments pervaded both the atmosphere of the Oneida Community and its official Handbook, it seems that the major decisions faced by the Community were made either by Noyes alone, or with the assistance of a small core of “central members,” with the community at large faithfully ratifying those decisions. To the extent that lay-members acknowledged the undemocratic nature of these decisions, it seems, they were satisfied by the fact that Noyes, felt by all to be divinely inspired and whose ideas were the backbone of the Community’s reason for existing, was the one steering the ship.²⁴ Additionally, considering that there were at any given time as many as twenty-one committees and forty-eight departments, it seems understandable that the Oneidans did not protest this centralizing function, in light of what would otherwise likely have been chaos. With this blend of egalitarian participatory democracy where possible, supplemented by centralized authority predominantly in the hands of Noyes, “[u]p to the very end, the Community functioned with scarcely a major quarrel.”²⁵

6. Mutual Criticism

A seemingly natural application of the Oneidans’ religious/moral beliefs in both egalitarian communal living and the potential for individual perfection, as well as the strong isolation-inspired *gemeinschaft* relations and affective ties within the community, mutual criticism supplied the community with an effective system of

own decisions. This dichotomy will be considered throughout this paper, especially in Section IV.

²¹KEPHART, *supra* note 8, at 111.

²²THE ONEIDA COMMUNITY, *supra* note 11, at 17.

²³*Id.* at 18. Also according to the Handbook, weekly meetings of the Business Board referred to above, thought of as a corporate board of directors, could be attended and participated in by any member of the community.

²⁴MAREN LOCKWOOD CARDEN, ONEIDA 88 (1969). It should be noted that Noyes’ status also provided him with greater sexual access to other members and exempted him from receiving mutual criticism (discussed below).

²⁵KEPHART, *supra* note 8, at 104.

social control. Though the system evolved somewhat over the course of the Community's existence, the essence of mutual criticism remained the same:

the character of a given member "became the subject of special scrutiny by all the members....On the presentation of his case each member in turn was called on to specify, as far and as frankly as possible, every thing objectionable in his character and conduct. In this way the person criticized had the advantage of a many-sided mirror in viewing himself, or perhaps it may be said was placed in the focus of a spiritual lens composed of all the judgments in the [Community]." ²⁶

In this description it is apparent that while mutual criticism may have served a social control-function, it was not necessarily viewed in this light by the membership. Rather, it was considered as perhaps the essential nexus between the possibility of perfection and a communal existence: by enlisting the entire Community in an individual's struggle, a sense of interconnectedness and of a shared struggle and reason for being were consistently reinforced.²⁷ Thus, even the *gesellschaft*-oriented problem-solving of social control both relied on and reaffirmed the affective relations and shared moral authority.²⁸ As testimony to the Oneidans' appreciation of criticism as a self-help mechanism, it should be noted that members frequently *volunteered* to be criticized by the group. The Community also used the process of criticism as a cure for physical ailments. Calling this version of criticism "krinopathy," or hygienic criticism, the Oneidans boldly claim in their handbook on mutual criticism "to have discovered a new curative." ²⁹

The social control function of mutual criticism, however, regardless of whether it was perceived as such by the typical member, was a powerful force at Oneida. While members often volunteered for criticism, it was also frequently imposed on particular members when it was felt that their behavior was incongruous with the

²⁶OFFICE OF THE AMERICAN SOCIALIST, *MUTUAL CRITICISM* 16-17 (1876). For a more detailed account of the system of mutual criticism, this text provides instructions on how both to receive and give criticism. It also includes numerous former members' first-person accounts of and reflections on the process.

²⁷Interestingly, the Community also considered as one of the beneficial functions of mutual criticism its preemptive nature in providing a more constructive outlet for the voicing of interpersonal conflicts and contentions inevitable in any close community. As the Community states in its publication on the subject, "Criticism is not more free with us, but it is distributed more profitably. We have a systematic plan of distribution, by which the true article is insured; and it is delivered in the right time and place....In the Community we draw it off from the mischievous channels of evil-thinking and scandal, and conduct it through plain speech to a beneficial result." *Id.* at 21.

²⁸In contrast, as we shall see in later sections, in communities without these tremendously strong affective relations and interpersonal needs and pressures, the functional process of social control tends to take a much different form. Where there are no affective and moral connections between members, providing for social pressure to conform and individual needs to remain within the community, social control must take on a more individualized, instrumental and strictly *gesellschaft* approach.

²⁹*Id.* at 71.

Community.³⁰ Thus, mutual criticism served two separate but related functions. On the one hand, it allowed the group to reaffirm and communicate to each other, through the substance of their criticisms, their perceptions of what it meant to be a member of the Oneida Community. And on the other hand, through the nature of the process of criticism, the Community was empowered through this realization and reaffirmation of shared values to impose pressure on deviant or potentially deviant members to conform to these norms. It would seem that without this first element of collective value affirmation (as might be the case in a less participatory or egalitarian criticism process), coupled with the severe isolation of the Community and the barriers to exit engendered by it, the social pressure of the second aspect would not be nearly as effective. As it was, “[m]utual criticism was effective because members’ self-esteem depended almost exclusively upon their fellow [members’] approval.”³¹ Accordingly, members undergoing criticism were expected to remain silent during the process, objecting only to the most glaring of factual inaccuracies, and to receive the criticism with utmost humility and “meekness of spirit.”³² The process would frequently conclude with the criticized member’s public confession of faults, and a promise to follow the advice of the Community. The process also served a convenient self-selection function: those whose lack of humility or belief in the rightness of the Oneida way (the moral orientation element of commitment) prevented them from being able to accept such criticism, when faced with the prospect of a life of mutual criticism, simply left the Community.³³

7. Summary

The Oneida Community represents about as extreme an example of an intentional community as may be found. For the purposes of this paper, in comparing the Oneida Community to the other two communities in Section I, the Amish and Satmar communities, five key attributes, all interwoven into the Oneida social fabric, and each at least to some degree dependent on the others, should be emphasized. First, at the center of the Oneida value system, and thus at the very heart of their collective reason for existing, was a strong and unified moral orientation: the belief in the

³⁰“In the great majority of cases criticism is desired and solicited by individuals...but in some instances, where it is noticed that persons are suffering from faults or influences that might be corrected or removed by criticism, they are advised to submit themselves to it. In extreme cases of disobedience to the Community regulations, or obsession by influences adverse to the general harmony, criticism is administered by the Community or its leaders without solicitation on the part of the subject.” *Id.* at 18.

³¹CARDEN, *supra* note 24, at 74.

³²“If anyone reacted to the criticism with sullen silence or with angry defense, he was reproved again. Stripped of all social support, he found no reassurance until he submitted completely to the Community’s judgment. Submission brought Community approval and personal catharsis.” *Id.* at 76. This humility and obedience to authority will be compared below to the similar concept of *Gelassenheit*, one of the major tenets of the Amish belief system.

³³On average, between three to five adult members left the community, or “seceded” each year. Though because this number does not include children, who were generally taken by seceding parents, the actual number was probably somewhat higher. CARDEN, *supra* note 24, at 77.

potential of every person, if placed in the proper environment, to achieve a perfect (sin-free) existence. Thus, as will be seen strongly in the other communities in Section I, religion is not only at the heart of the Oneida ideology and belief system, but is also impossible to separate from the daily activities of its members. Second, in providing such a perfection-inspiring environment, the Oneida Community was communal in nature, with a dominant focus on the collective, rather than on the individual. Third, the strongly *gemeinschaft*-oriented organizational and decision-making structure was, to a large degree, egalitarian, often requiring intense participation from, and instilling a sense of involvement in every member. Fourth, the exception to this egalitarianism may be seen in the divine status and major-decision-authority granted by the Community to its founder and charismatic leader, John Humphrey Noyes. Fifth, the Community was intensely isolated, both physically and psychologically, from American society, effectively eviscerating individual members' interpersonal, social, political, or moral connections to the "World."

All of these five factors together contributed both to a very defined set of communally held beliefs, values, goals, and norms, and to a climate of intense social relations and individual reliance on social connectedness between, and acceptance from, community members. As a result, the Oneida could utilize these affective and *gemeinschaft* orientations towards functional (*gesellschaft*) ends—the deep feelings between members, and the social pressure inspired by these feelings could be harnessed by and institutionalized in the process of mutual criticism to control deviance and maintain the boundaries of the Oneida community circle. Thus, just as we will see in the following two examples, a symbiotic relationship existed between core community values, the *gemeinschaft/gesellschaft* nature of the community, the individual desires and needs of members, and the exercise of social control. As the re-affirming and deviance-controlling nature of mutual criticism guarded against the gradual erosion of the Oneida's shared beliefs, the system of mutual criticism itself could never have succeeded without reliance on those very same values. Likewise, just as the isolation- and communalism-inspired affective relations between members made possible a group-oriented process of social control, this social control process at the same time worked to heighten members' reliance on and need for social acceptance. It is in these symbiotic relationships that the circle of the Oneida Community is drawn, the effect being simultaneously the coalescing of the community within and the erecting and reinforcing of a barrier without.

B. *The Old Order Amish*

1. Brief History

The Amish are one of the several direct descendants of the Swiss Anabaptists, who, along with the followers of Martin Luther, John Calvin and Ulrich Zwingli, broke from the Roman Catholic Church in the early 16th Century. Considered more radical than the other reformers of their day, the Anabaptists centered their beliefs around strong commitment to community, strict adherence to the teachings of Jesus, and the concept of adult baptism.³⁴ They believed that, according to the bible, since

³⁴“The term Anabaptist originated as a nickname meaning ‘rebaptizer’.” JOHN A. HOSTETLER, *AMISH SOCIETY* 27 (3d ed., The John Hopkins University Press 1980).

sin only comes with the knowledge of good and evil, then babies, who are without such knowledge, have no need for the purification of baptism. Thus, the Anabaptists felt that baptism was more appropriate once a person has matured and become accountable for his or her own actions.

Divisions soon emerged, however, and around 1536, the Mennonites, under the leadership of Menno Simons, broke from the rest of the Anabaptists. Nearing the end of the 17th century, after two-hundred years of agrarian living in the European valleys of the Jura and Vosges Mountains, a further rift divided the Mennonite majority from a group that would, behind the divisive presence of Jacob Amman, become the Amish. The Amish believed that the Mennonites had unacceptably relaxed many of their practices. The new group advocated semi-annual Communion (rather than annual), a traditional physical appearance, and restoration of the *Meidung*—punishment of religious wrongdoers through excommunication and strict social avoidance.³⁵

As part of the great waves of Germanic immigration of the 18th and 19th Centuries, in 1737 the first Amish ship, the *Charming Nancy*, arrived on the shores of the new world. This would be only the first of many loads of Amish people seeking religious tolerance in America during the mid-18th century, and again during the mid-19th century. These early immigrants settled first in Pennsylvania, but, in time, expanded westward to Ohio, Indiana, Iowa and elsewhere. Though enjoying the freedoms of the New World, factions among the Amish continued to divide the population. On three occasions between 1877 and 1966, small groups of Amish, finding the strictness of Amish life oppressive, sprung out of the traditional Amish community. The first, the Meetinghouse Amish, eventually folded into the Mennonite church, while the other two groups, the Peachey (or Beachy) Amish and the New Order Amish continue today. Thus it is that the traditional Amish, from which these three groups sprung, have come to be called Old Order (or House) Amish.³⁶ As of the mid-1980s, there were 175 major Old Order Amish settlements in North America, home to just over 100,000 Old Order Amish.³⁷ Today's Old Order Amish,³⁸ unlike the Oneida Community discussed above, are the possessors of a long and storied tradition, a fact which, as will be seen below, has significant effects on the nature and functioning of the community.³⁹

³⁵Details of the Amish use of the *Meidung* will be explored in detail further on in this section.

³⁶It will be the Old Order Amish, the most traditional of the Amish groups, that will be the focus of this section. While there are even variations (mainly in custom) among the many Old Order Amish communities in America, they are similar enough that they may, for the purposes of this paper, be considered as a single group. More on the organizational factors that allow such variations within the Old Order Amish will come later in this section.

³⁷DAVID LUTHY, *AMISH SETTLEMENTS ACROSS AMERICA* 1-6 (1985); BEN J. RABER, *THE NEW AMERICAN ALMANAC* (1986).

³⁸For the sake of convenience, unless specified, I will refer to the Old Order Amish simply as "Amish."

³⁹For a very helpful timetable of significant events in the history of the Amish, dating back to A.D. 70. See BERND G. LANGIN, *PLAIN AND AMISH* 384-89 (1994).

2. Amish Christianity and *Gelassenheit*

The Amish version of Christianity, much like the Oneida's, is one that permeates every aspect of daily life.⁴⁰ To the Amish, Christianity is better learned and practiced through everyday activity and work than it is through textual study. At the heart of this Amish Christian lifestyle is the notion of *Gelassenheit*, which, roughly translated as "submission," incorporates into the Amish belief system the qualities of "obedience, humility, submission, thrift and simplicity."⁴¹ Where modern Christianity is focussed around a church, the Amish have no such place of worship, instead rotating from home to home for bi-weekly community prayer services.⁴² Where modern Christian children attend Sunday School, and where modern Christian leaders are ordained and evaluated on the basis of their knowledge and scholarship, the Amish frown upon too much knowledge of the scriptures. Likewise, even the preachers of the community, elected by the community not necessarily on the basis of their religious scholarship,⁴³ during their sermons tend not to analyze, rationalize or otherwise interpret the words of the bible. The Amish believe that the established Christian church has lost its way, and that in isolating themselves from that mainstream Christianity, it is "[t]he aim of the Amish [] to incarnate the teachings of Jesus into a voluntary social order."⁴⁴ As will be seen in the features considered below, Amish Christianity lies at the very center of what defines the Amish community.

3. Communalism

The Amish do not live communally. Quite to the contrary, it is the family structure (in the traditional sense of parents and children) that both socially and economically binds the Amish together. Traditionally an agrarian people, it is the ambition of the typical Amish family to own and work its own small farm, husband and wife saving money from marriage someday to help their children make down payments on their own farms.⁴⁵ Yet while the primary group for the Amish is the

⁴⁰It is thus vital to realize in considering the nature of the Amish community, that it is essentially impossible to isolate religion from the rest of Amish life.

⁴¹DONALD B. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* 25 (1989).

⁴²It is from this tradition that the name "House Amish" likely arose.

⁴³"Attending a seminary would be a sure sign of worldliness and reason for excommunication, for it would indicate a loss of humility and the development of an ego." HOSTETLER, *supra* note 34, at 108.

⁴⁴*Id.* at 77. As a basis for this desire for isolation, the Amish generally point to three biblical passages: *Rom.* 12:2 ("Be not conformed to this world, but be ye transformed by the renewing of your mind that ye may prove what is that good and acceptable and perfect will of God."); *II Cor.* 6:14 ("Be ye not unequally yoked together with unbelievers; for what fellowship hath righteousness with unrighteousness? What communion hath light with darkness?"); and *1 Peter* 2:9 ("But ye are a chosen generation, a royal priesthood, an holy nation, a peculiar people.").

⁴⁵*Id.* at 132. In recent times, due both to modern farming innovations and to serious land squeezes, some Amish families are having to leave the farming lifestyle. Where possible, they try to find work in farming-related industries like carpentry. For a discussion of this recent phenomenon, in reference to a particular Indiana Amish community, see Thomas J. Meyers,

immediate family, a variety of factors contributes to what is, if not a community-wide primary group, at the least a community-wide sense of shared beliefs and interdependence to a degree rarely seen in modern American society.

Amish communalism, then, is not so much literal communalism, in the sense of group ownership and group living, but rather a spiritual communalism based in the spirit of *Gelassenheit*. There is an understanding among the Amish that the fate of the community as a whole supercedes individuality or individual ownership. Thus, while individual families own their own homes and farms, reaping profits to be kept by those individual family units, the level of sharing and interdependence between families, as Elmer and Dorothy Schwieder argue, is such that the Amish may be called a “semicomunal society.”⁴⁶ Wherever possible, the Amish form collectives: from fire insurance⁴⁷ to medical insurance to bank loans, the community organizes to divide responsibility among the many families. In a particularly widely reported series of events, the Amish refused, on the basis of their faith, to pay or receive social security.⁴⁸ Arguing that their receipt of social security would create a dependence on the United States government, an abhorrent result in their eyes, they sought, and ultimately received, an exemption from the law mandating payments from self-employed persons.⁴⁹ This “mutual assistance” also appears informally. For example, when an Amish farmer desires to build a new building, the community will come together for a day, for what they term a “frolic”, to construct the building. Thus, as was the case among the Oneida, though here perhaps to a somewhat lesser degree, the Amish inject into many of their daily *gesellschaft* functions (insurance building construction, etc.) the spirit of *gemeinschaft*. The Amish desire for community independence from external aid, coupled with the difficulties of the agricultural life (particularly in light of their self-imposed technological restrictions, discussed below), make this mutual assistance a necessity. Yet, as practically and functionally necessary as it may be, mutual aid also serves to reinforce a sense of interdependence and communalism—a sense of *gemeinschaft* community—among the Amish.

4. Isolation and The *Ordnung*

As discussed above, the Amish seek to separate themselves from mainstream American society. Once, perhaps, the Amish were as physically isolated as were the

Lunch Pails and Factories, in *THE AMISH STRUGGLE WITH MODERNITY* 165-181 (Donald B. Kraybill & Marc A. Olshan eds., 1994).

⁴⁶DOROTHY SCHWEIDER & ELMER SCHWEIDER, *A PECULIAR PEOPLE: IOWA'S OLD ORDER AMISH* 39 (1975).

⁴⁷One representative example of an Iowa Amish community's internal fire insurance system is described in *A Peculiar People*. It explains that where a member “loses a farm building due to fire or windstorm, the farmer suffering the misfortune will pay one-fourth the cost himself and the remaining three-fourths is divided among” the rest of the community, each family paying according to its needs, as determined by church leaders. *Id.* at 40-41.

⁴⁸See, e.g., Clarence W. Hall, *The Revolt of the Plain People*, *READER'S DIGEST*, Nov. 1962.

⁴⁹Before Congressional committees, they cited the Bible as the basis of their refusal: “if any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel.” 1 *Tim.* 5:8.

Oneida Community. But with their own increased numbers, and the shrinking of farmland across America generally, it is one of the Amish's great struggles with modernity to maintain this sense of separateness from the growing levels of intrusion from the outside world.⁵⁰ Thus, in recent times, where it is not uncommon for Amish families to have non-Amish neighbors living right next door, Amish separateness must be reinforced in other ways. For this, the Amish have the *Ordnung*. In part deriving from centuries-old tradition, and in part the result of semi-annual meetings of local church leaders, the *Ordnung* are the rules by which Amish life is defined and by which Amish identity is formed and reinforced. In so doing, it serves as the basis for Amish separateness and isolation.

As mentioned briefly above, the Amish are practitioners of adult baptism. Prior to baptism (which usually takes place between sixteen and twenty-one years of age), a young Amish person is not technically responsible for following the *Ordnung*. It is not until baptism, the moment at which the member voluntarily decides⁵¹ to become a full adult member of the church, that he or she must, in the eyes of the church and the community, rigorously follow the rules of the church district. This fact has

⁵⁰For more on the effects of modernity on the Amish lifestyle and economic pursuits, much is provided in DONALD B. KRAYBILL & STEVEN M. NOLT, *AMISH ENTERPRISE* (1995); and in KRAYBILL & OLSHAN, *supra* note 45.

⁵¹I would like again to consider, much as I did in discussing the Oneida above, the reality of a young Amish person's ability to choose not to take baptism—to decide not to become a full member of the church. Prior to baptism, because the young Amish are not literally required by the church to follow the rules of the *Ordnung*, the responsibility of keeping the youths in line falls on parents. From early childhood, Amish children are made aware of their distinctiveness, and are raised so carefully within an insular Amish world that they generally do not feel comfortable outside of it. They wear distinctive Amish clothing, learn to speak German, and attend Amish schools. In other words, through the maintenance of a strict Amish upbringing, the Amish community creates for its youths an affective and instrumental dependence and a moral provincialism that in many instances constructs a virtually insurmountable obstacle to an individual member's efforts to exit the community. Thus, even though pre-baptism Amish youths are given somewhat more latitude than full adult members (for exactly the purpose of informing their upcoming baptism decision through experiencing a taste of the outside world), only a small percentage of Amish youths choose not to be baptized into the adult membership. Interestingly, it seems that the more liberal Amish communities (the New Order Amish, the Beachy Amish and the like), whose youths tend to gain somewhat more experience with the outside world, have on average a much lower retention rate. In one Ohio county, for example, the most traditional Amish communities retain around 90 percent of their youths, where the least traditional Amish groups baptize less than 60 percent. See KRAYBILL & OLSHAN, *supra* note 45, at 73.

Whether these retention rates evidence the greater appeal of increasingly strict Amish life, or the effects of a dangerously isolated and regimented childhood has long been discussed. Much of the debate since the Supreme Court case of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), (exempting Amish children from mandatory schooling until the age of sixteen) involved the issue of Amish children's rights to make their own life choices. Many argued that, because of the insulated nature of an Amish upbringing (made increasingly insular by the Court's decision in *Yoder*), Amish children are effectively precluded from making their own voluntary decisions whether to remain within the Amish community or to leave it. This issue will be reconsidered in Section IV.

significant implications in regard to excommunication and shunning, discussed below, in connection with transgressions of the *Ordnung*.⁵²

Because much of the *Ordnung* is not based on tradition, but rather on the semi-yearly decisions of each community's leaders, there is invariably some variation in custom from one Amish community to another. However, as one scholar familiar with the Amish explains, it is not so much the particular customs that are of utmost significance, but rather the effect of these customs in separating the Amish from the rest of the world.

To be separate from the world is to be different from the world. Being different is more important, within limits, than specific ways of being different....The strong commitment to the principle of separation from the world also helps to explain why the Amish are not disturbed by slightly different rules in other Amish communities.⁵³

For the most part, however, the *Ordnung* remains fairly constant from one community to another. Long hair, dark, formal clothes, shaven mustaches with long beards for married men, no automobiles, no central heating or electricity, the use of horses, limited formal education and the use of German dialect tend to be the most universal and outwardly observable tenets of the *Ordnung*. It is precisely because of the outward perceptibility of these features that they are practiced by the Amish: to look different is to be different. Also, with proscriptions on automobiles, televisions and the like, the Amish not only look to separate others from them, but also to isolate themselves from others. Thus, the *Ordnung* serves three related functions: first, to forge identity by visibly distinguishing the Amish from their mainstream neighbors; second, to form and reinforce a common lifestyle by which to unify the members of a given Amish community; and third, whether intentional or not, to create the types of strong affective, instrumental, and moral isolation to serve as a barrier to membership secession.

5. Organizational Structure

Amish communities may be found in twenty-three different states or provinces across North America.⁵⁴ Yet, with the exception of relatively recent and issue-specific organizations and committees, they have few organizational structures extending beyond the individual church district level. A typical church district, the basic social unit beyond the individual family, is generally comprised of about twenty extended family units (around 165 people), living in close distance to each other.⁵⁵ Because of high rates of intermarriage, many members of a single district will have the same last name, often with four or five names accounting for nearly

⁵²For an account of the standard Amish baptismal service, see HOSTETLER, *supra* note 32, at 81-83.

⁵³*Id.* at 85.

⁵⁴For a listing of each settlement, including the date founded and the number of congregations per settlement, see David Luthy, *Amish Migration Patterns: 1972-1992*, in THE AMISH STRUGGLE WITH MODERNITY (Donald B. Kraybill & Marc A. Olsham eds., 1994).

⁵⁵KRAYBILL, *supra* note 41, at 76.

three-fourths of the district population.⁵⁶ The church district is the central unit around which Amish social, religious and economic life revolves.

As the central community unit, each church district has its own leadership, consisting of three positions: a bishop (though sometimes a bishop will preside over two districts), two or three preachers, and a deacon. Each position has its own roles and responsibilities, usually extending from the religious nature to the social to the political. At the head of this structure presides the bishop, the spiritual head of the community. It is his job to interpret local regulations and to make decisions regarding deviant behavior. Beneath the bishop, the preachers, sometimes called ministers, are responsible for giving the sermons during the bi-weekly worship services. Finally, it is the deacon's job to lead prayers during worship services and to assist the needy of the community. Though these are the general duties of the three positions, they often overlap with each other and also expand into other areas of life. As one scholar explained, quite generally, "The bishop, minister, and deacon form an informal 'executive committee' that guides and coordinates the activities of the local district."⁵⁷

Though an organizational body consisting of only four or five members may seem like a rather centralized model, several contributing factors reveal that the Amish possess within this structure a strong sense of egalitarian democratic participation. First, in a manner reminiscent of the Oneidan decision-making process, though the leaders of the community often give advice and make recommendations on major community decisions, technically, the decisions are not made without a vote of all adult members of the church district. With this in mind, Hostetler has labeled the Amish organizational/decision-making system a "patriarchal democracy."⁵⁸

The second insight into the Amish organizational structure comes with an understanding of the process of selecting these leaders. With the exception of the bishop, who must first serve in one of the lesser positions before rising to bishop, the district leaders are selected on the combined basis of democratic choice and divine intervention. When a position opens up (which is rare, since leadership positions are for life), each adult district member casts a nomination, whispering to the bishop through a nearly closed door the name of a fellow-member who would be fit for the task. When all the nominees have been selected, a stack of bibles is piled before them, one bible for each nominee. Each nominee in turn chooses one bible from the collection, in one of which has secretly been placed a piece of paper containing a biblical passage. The one who chooses the bible with the extra piece of paper has been "struck," and has thus been chosen in accordance with God's will to help lead the community. In this manner, much as John Humphrey Noyes's divine status lent a spiritual weight to his words and decisions, by allowing God's will to make the final selection for district leaders, the Amish may also rely on those leaders' decisions as being, to a degree, the will of God. It is with this combination of egalitarian democracy and religious faith, based on the spirit of *Gelassenheit*, that

⁵⁶*Id.* at 77.

⁵⁷*Id.* at 80.

⁵⁸HOSTETLER, *supra* note 34, at 111.

decisions are made and shared values and social norms are determined, reified, and enforced.

6. The *Meidung*

As mentioned above, at the heart of the Amish split from the Mennonites around 1700 was the controversy over the *Meidung*. To this day, where Mennonite communities do not strictly enforce the *Meidung* (“the shunning or avoiding of excommunicated members”),⁵⁹ for the Amish, it is perhaps the central element of social control.⁶⁰ With scriptural bases in 1 Cor. 5:9-11, Rom. 16:17, 2 Thess. 3:14,15, and Titus 3:10,11, the *Meidung* serves numerous purposes, from punishing the transgressor, to attempting to coax the transgressor towards mending his ways, to protecting the rest of the community from impure elements. One insight into the reasoning behind the *Meidung*, as explained by Amish leaders themselves, states as follows:

If anyone whether it be through a wicked life or perverse doctrine is...expelled from the church he must also according to the doctrine of Christ and his apostles, be shunned and avoided by all the members of the church.... In short that we are to have nothing to do with him; so that we may not become defiled by intercourse with him and partakers of his sins, but that he may be made ashamed, be affected in his mind, convinced in his conscience and thereby induced to amend his ways.⁶¹

Though fear of the *Meidung* looms over all facets of Amish life, its actual application *Meidung* is considered a last resort. Where a transgressor of the *Ordnung* has been identified, generally, the first step is an informal one: gossip within the community and the like. Where this shows no effect, the church leaders will tend to intervene, either in the form of a visit to the transgressor by the bishop or preacher, or else a request for the transgressor to appear before the congregation to confess his or her errant behavior and ask forgiveness. Where necessary, however, if no apology or improvement in behavior is made, the final step is the imposition of the *Meidung*. Because of the seriousness of this last resort, though the bishop is the one formally responsible for imposing the *Meidung*, it generally will not be imposed without the near consensus of the entire church district. Once the punishment has been imposed, however, it is total. The shunned member may not eat at the same table as his family, and must sleep in a separate bed or room. If he or she is married, marital relations will be terminated. Generally, church members are persuaded to have as little contact as possible with the shunned member. The *Meidung* will extend not only to the members of the church district (who, if they ignore the *Meidung*, will themselves receive the same punishment), but also to all other Amish communities. The *Meidung*, then, is not only aimed at the transgressor (either as punishment or as an incentive to reform), but may also be considered a command to the community in general, serving the multiple purposes of (1) setting an example of

⁵⁹KEPHART, *supra* note 8, at 49.

⁶⁰Recall that because Amish people who have yet to be baptized are not required by the church to follow the rules of the *Ordnung*, they are likewise not subject to the imposition of the *Meidung*.

⁶¹KRAYBILL, *supra* note 41, at 116 (citing The Dordrecht Confession of Faith).

what happens to transgressors, (2) protecting the community from unwanted influences, and (3) reinforcing the acceptable boundaries of behavior.

From the perspective of the shunned member, however, the imposition of the *Meidung* is a harsh reality. Because of the Amish community's high degree of isolation from mainstream society, a shunned member is not only suddenly without the constant contact and affection of his friends and family, but is also left in a very unfamiliar world. It is a limbo state between, on one side, his or her family and community, who are forbidden from interacting with him or her, and on the other side the outside world, with which the shunned member has likely had extremely little contact. Furthermore, a newly shunned member realizes that a move towards mainstream society will only alienate him or her further from the Amish community. It is this sense of limbo that makes the *Meidung*, and perhaps even more significantly, the very *threat* of the *Meidung*, so effective.

Though the *Meidung* is imposed for life, it may be revoked upon the public admission and apology of the shunned member. And, as one writer explains, the pull of desire for renewed acceptance by the community tends to be quite effective in eliciting such an apology: "Following the pronouncement of shunning, the religious leaders continue their efforts to persuade the sinful member to repent and again enter into full fellowship with the group. Faced with loss of contact with friends and family as well as the immense family suffering, the errant member will usually quickly repent."⁶² Yet, Amish leaders are aware that the *Meidung* is not imposed solely with the individual transgressor in mind—it has also been imposed for the protection of the whole community from the contaminating effects of "un-Amish behavior." Premature re-acceptance of the shunned member may jeopardize the whole community if his or her behavior has not truly been modified. Church leaders must therefore walk a fine line between, among other considerations, their desire to help the shunned member mend his or her ways, and their responsibility to protect the community from further corruption.⁶³

7. Summary

Having survived and prospered in America for more than 250 years, the Old Order Amish are a shining example of resilience. Though their culture has surely evolved since the 18th Century, the ability of the Amish over the years to maintain a powerful sense of community and an equally strong sense of separateness from the rest of society, is remarkable. In comparing the Amish to the other two communities in this Section, six features stand out as particularly significant. First, unlike the Oneida, the Amish have a long and well-documented history. In their ability to point to generations of blood descendants in whose path they follow, and the hardships that those generations faced, the Amish gain a potent tool in encouraging a sense of tradition and a shared desire to perpetuate it. Second, the spirit of *Gelassenheit*, at the core of Amish beliefs, feeds not only obedience to current community norms but also the humility and submission beneficial to maintaining order and social control

⁶²SCHWEIDER & SCHWEIDER, *supra* note 46, at 67.

⁶³For a description of the procedure for readmitting shunned members back into the community following their public admission and apology, see Joseph Unzicker, *Restoring A Fallen Member*, in AMISH ROOTS: A TREASURY OF HISTORY, WISDOM, AND LORE 92-93 (John A. Hostetler ed., 1989).

over time. Third, the Amish variation on communalism, the formal and informal mutual assistance of “semi-communalism,” serves the dual role of perpetuating the economic health of the community and of forging a sense of collective responsibility, interdependence and shared fate. Fourth, though not as physically isolated as the Oneida, the strict rules of the *Ordnung* and the visibly distinctive lifestyle mandated by it, nonetheless successfully isolate the Amish from their mainstream neighbors. Fifth, the organizational and decision-making structure of the Amish church districts creates a strong sense of participation. A small, essentially self-sufficient and autonomous social unit, with leaders determined by both popularly and divinely selected forces, the church district creates an atmosphere of “patriarchal democracy” that instills in its lay members a strong sense of involvement in the community.

Just as was seen with the Oneida, the combination of the above characteristics makes social pressure a particularly potent force. Yet, perhaps because of the relatively greater emphasis among the Amish on family as the primary group, or because of the humility and submission of *Gelassenheit*, or the weaker emphasis placed on individual perfection, mutual criticism is not to be found among the Amish. It is instead the fear of the *Meidung*—of being excluded from the particularities and closeness of the community and cast out into an unfamiliar world—that works to control deviant behavior. Thus, just as mutual criticism worked symbiotically with the characteristics of Oneida life, so too does the *Meidung* rely on, and at the same time perpetuate, the shared norms and beliefs of the Amish. Without the intense isolation, the strong sense of tradition, the submission of *Gelassenheit*, and the rest of the characteristics that together comprise Amish-ness, the *Meidung* would be nothing more than the common occurrence to which mainstream Americans benignly refer as “leaving the nest.” The *Meidung* fortifies the circumference around the Amish circle of community.

C. Conclusions

From an examination of these two examples of community, we can make several observations and glean a number of important lessons. We see that strong orientations towards affectivity and moral cohesion, coupled with predominantly *gemeinschaftian* functions, creates a climate of heightened social pressure. Among both the Amish and the Oneida, members held cohesive and clear understandings of what was “right” or “wrong” behavior. In the form both of clear religious and moral bases of belief and of structured and systematic programs of communalism, civic participation, and physical and symbolic isolation from the outside world, the Amish and Oneida constantly reinforced group norms of belief and behavior. Further, community members were able to impose these collective norms on potential deviants, because of the intense affectivity felt between members. Humility and a group-first mentality were emphasized in both these communities, intensifying the power of criticism from the community, and to a degree deflating any potential for discussion of individual substantive or procedural rights. It might thus be said that the strong interconnectedness among members, and the cohesiveness of beliefs and norms enabled these communities to infuse into their *gesellschaft* functions (in particular that of social control) the benefits of *gemeinschaft* relations.

Adding to the internal authority of this informal social control, the intense isolation of these communities likely made ties between members and general acceptance from the community seem, to the individual member, all the more a necessity for survival. Interpersonal ties to the outside world were few; educational

instruction on the skills needed to survive in the outside world were scarce; and the moral and religious teachings of the community painted a picture of the outside world as a dangerous and troubled place. In envisioning the circles of community proposed at the beginning of this paper, where there were few (or perhaps none) other circles overlapping these communities, the transition from one circle to another (as the result of significant deviation from group norms) is a seemingly insurmountable obstacle. Accordingly, not only was the potency of social pressure a product of deep internal ties, but it was also a result of the fact that barriers to exit (both affective, instrumental and moral) were rigorous, and thus the risks of deviance—complete alienation and isolation from one's community—were incredibly severe.⁶⁴ In the most simple terms, we see, again, that there is a symbiotic relationship at work within each of the Section I communities, between the core values, goals and general natures of those communities and their respective social control functions.

III. SECTION II.

A. *Residential Community Associations*

More than 205,000 Residential Community Associations (RCAs) throughout the United States are home to over 42 million Americans, representing 15% of all housing nationwide.⁶⁵ Thus, unlike with the other communities considered above, it would be ridiculous to discuss all RCAs as a single community. In this section, I will look at the “RCA movement” in generalized terms, drawing on secondary sources which have in the same manner examined the most common features of the many RCAs. Though the picture of RCAs will not emerge as clearly as the other, more specific (and smaller) communities considered above, it is my hope that this section will provide at least some understanding of why people have chosen to create and live in RCAs, the nature of “community” within RCAs, the organizational structures of those associations, and the manner in which deviant behavior is controlled. In other words, it is my goal to consider the RCA movement from the same perspective and with the same format as I have previously considered the other communities above. This will, I hope, provide an interesting basis by which to compare extremely different types of communities, and the relationships within each of those communities between shared beliefs, values and behavioral norms and the mechanisms by which they are controlled, reinforced and perpetuated by the community.

⁶⁴We will return for further discussion of the significance of individual member's barriers to exit in Section IV.

⁶⁵This figure was provided by the Community Associations Institute, a national nonprofit organization created to provide guidance and educational and training services to RCA memberships and management. To find out more, see <http://www.caionline.org> (last visited April 2001).

1. Definition and Brief History

Though RCAs⁶⁶ take numerous forms, in most basic terms they may all as a group be defined as mandatory membership organizations, entered into by covenant in conjunction with deed of ownership, which require dues assessments from its members in return for providing a wide array of services and shared facilities. They may vary in size from fewer than ten residents to as many as 68,000, with organizational structures of correspondingly varying sizes. They may be “territorial,” with numerous individual buildings on a common site, some owned individually by members, some owned by the association; or they may be contained within a single hi-rise building, with each member owning individually the interior space of a given apartment unit, and sharing in the ownership of the common areas.⁶⁷ A third, though far less common type of legal structure is the cooperative, in which individual members do not own units outright, but rather all own shares in the entire building, and as a result of share-ownership gain rights to particular units. Regardless of legal format, when an individual purchases a unit within an RCA, he or she becomes contractually bound by that Association’s conditions, covenants, and restrictions (“CC&R’s”), which much like a city’s local ordinances (or in a sense like the Amish *Ordnung*), govern life within the Community.⁶⁸

It is likely that the broad conception at the heart of the RCA—a blend of individual home ownership and shared use of common spaces—dates back to the

⁶⁶Other commonly used names for RCAs include: residential associations, homeowners’ associations, property owners’ associations, planned communities, condominium associations, common interest associations, cooperatives, or councils of co-owners.

⁶⁷For the purposes of this paper, there is no great need to get into the details of the various possible legal forms of RCAs. Most basically, RCAs blend individual unit ownership with shared ownership of or responsibility for common areas and shared facilities. Thus, when a person purchases a unit, be it a stand-alone house within a “territorial” association or a condominium apartment unit, he or she will also, as a mandatory effect of purchase, by covenant enter into the Association. In so doing, that individual will gain the benefit of common facilities and services,—generally, either (1) as with condominiums, through contractual common interest ownership (of the property directly, where unincorporated, or indirectly, as a shareholder, where incorporated), or else (2) where the Association itself owns the common areas, through contractual membership assessment fees. For a more detailed account of the various legal structures of RCAs, see, WAYNE S. HYATT & SUSAN F. FRENCH, *COMMUNITY ASSOCIATION LAW* (1998).

⁶⁸This comparison between RCAs and cities is perhaps the most controversial and widely debated issue in the field. Its ramifications, from Due Process issues to Equal Protection issues, to §1983 liability issues, are huge. Though in this section I will discuss some of the public functions served by RCAs, I will not directly address the public-private distinction. For one source providing a nice survey of the debate, see Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: ‘The State Will Make the Call’*, 30 VAL. U. L. REV. 509 (1996). For a second, much shorter article, covering the major theories of public-private distinction, and the consequences of finding RCAs private, see Katherine Rosenberry, *Condominium and Homeowner Associations: Should They Be Treated Like ‘Mini-Governments?’*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM* (U.S. Advisory Commission on Intergovernmental Relations ed., 1989).

earliest of civilizations.⁶⁹ But according to at least one expert in the RCA field, the modern conception got its start in 1808, with the creation by covenant upon the conveyance of land, a mandate specifically designating property in Leicester Square, in London, England to remain as a garden to be freely enjoyed by adjoining tenants. With the Court's decision in *Tulk v. Moxhay* 41 Eng. Rep. 1143 (Ch. 1848) to enforce the covenanted restriction (on grounds that the purchaser was aware of the restriction), the notion of equitable servitudes was born, and with it the concept of insuring future property-sharing through the use of such restricting covenants.

In time, the notion of restrictive covenants made its way across the Atlantic, finding open arms at the turn of the 20th Century in the form of upper-class communities seeking legal teeth for their exclusionary desires.⁷⁰ With the New Deal, the birth of the Federal Housing Commission, and the post-war baby boom, subdivisions with restrictive covenants in their deeds began to proliferate, and at the same time the popularity of the condominium grew enormously.⁷¹ Yet, even by 1960, fewer than one thousand Associations existed nationwide, and most were still single-family unit Associations "in relatively exclusive neighborhoods."⁷² With increases in property costs during the 1960s, though, developers began to have difficulty finding buyers for their large lot single-family homes. At the same time, local governments, facing budget crunches, were seeking ways of reducing their own responsibility in providing services to their citizens. In reaction to these concurrent trends, developers began to subdivide the large lots, building smaller, less expensive houses with relaxed use restrictions (known as Planned Use Developments, or PUDs), and providing formerly-government-provided services through the inception of RCAs.⁷³ At the same time, also on the basis of their inexpensiveness and convenience, condominium sales were skyrocketing as well. By the end of the 1970s, there were 186,000 condominium starts each year, accounting for 14% of all annual housing starts.⁷⁴ In all, about half of all new homes currently built in the United States are in RCAs.⁷⁵

Through the 1980s, RCAs grew both in number and in variety. No longer were they solely enclaves for the rich or resort communities for the elderly. They now spanned in scope from a few homes on a privatized street to medium-sized cities like Reston, Virginia and Columbia, Maryland. With the dramatic increase in variety, it

⁶⁹For example, Edward J. Blakely and Mary Gail Snyder discuss one of the early examples of a gated community: "In England the earliest gated communities were build by the occupying Romans around 300 B.C. Roman soldiers were given land and estates in tribal areas after their term of service in the army.... Roman families clustered near or within the manor precinct and erected walls...." EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* (1997).

⁷⁰EVAN MCKENZIE, *PRIVATOPIA* (1994).

⁷¹*See generally id.* at ch. 2; HYATT & FRENCH, *supra* note 67, at 19-22.

⁷²ROBERT JAY DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 49 (1992).

⁷³*Id.* at 50.

⁷⁴JAMES DOWDEN, *COMMUNITY ASSOCIATIONS: A GUIDE FOR PUBLIC OFFICIALS* (1980).

⁷⁵*See* <http://www.caionline.org> (last visited April 2001).

is consequently increasingly difficult to provide a single definition for an RCA or to discuss the “nature” or “structure” or “mechanisms of social control” of RCAs generally. Accordingly, I again encourage the reader, in considering the aspects of RCAs discussed below, to be mindful of the fact that they are being presented as generalized conceptions of this large-scale movement. While there will no doubt be exceptions to nearly every generalization, I remain hopeful that such a general discussion will nonetheless provide some utility in providing a sense of the circle of community captured by RCAs.

2. Community Beliefs or Shared Goals?

So what is it that unites people, either to create an RCA or to move to one? What puts the “community” in “residential community association”? To varying degrees, those who have studied the RCA movement over the years tend to focus on the following aspects: cost-effective services,⁷⁶ safety,⁷⁷ a sense of community inspired by the shared use of such facilities as swimming pools and golf courses,⁷⁸ increased participation in local decision-making,⁷⁹ the aesthetic continuity and regulation of use restrictions,⁸⁰ and the security in future property values felt to be insured by these factors.⁸¹ (Interestingly, the RCAs themselves tend to emphasize some of these features more—or at least more explicitly—than others.⁸²) However, at the risk of redundancy, RCAs are a far more difficult “community” to pinpoint than the

⁷⁶See, e.g., Ronald J. Oakerson, *Private Street Associations in St. Louis County: Subdivisions as Service Providers*, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM (U.S. Advisory Commission on Intergovernmental Relations ed., 1989) (considering the effectiveness of a street privatization scheme, which, dating back to the mid-19th Century, which provides for subdivisions as small as just several houses along a single street, together having contracted for their own service provision).

⁷⁷For a somewhat tongue-in-cheek discussion of the safety benefits of RCAs, in particular gated communities, see BLAKELY & SNYDER, *supra* note 69, at 18, 99-124. The authors also note that “[a] 1990 survey of southern California home shoppers found that 54 percent wanted a gated, walled development....” *Id.* at 7. Though this is not necessarily an indication that these home shoppers wanted to live in walled developments for the sake of improved safety, common sense suggests that for most of these shoppers, safety must have been at least a strongly contributing factor to this preference.

⁷⁸See, e.g., CARL NORCROSS, *TOWNHOUSES & CONDOMINIUMS: RESIDENTS’ LIKES AND DISLIKES* (1973).

⁷⁹See, e.g., Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375 (1994) (considering the benefits of RCAs, highlights their ability to increase resident input in the community decision-making and community character-determining processes).

⁸⁰See <http://www.caionline.org/about/explanation.cfm> (last visited April 2001).

⁸¹“Preservation of property values is the highest social goal [within RCAs], to which other aspects of community life are subordinated.” MCKENZIE, *supra* note 70, at 19.

⁸²It is interesting in this regard to explore various RCA web sites. Though I have not conducted an exhaustive study, it appears they attempt to emphasize both these types of relations. If interested in exploring these sites, a helpful place to start is at the Community Associations Institute web site, which includes a series of links to all its members’ sites, at <http://www.caionline.org/about/hoalinks.cfm> (last visited April 2001).

communities in Section I. From one Association to another, as the size, shape, location and populations change dramatically, so too will the degrees to which each of these features is emphasized, promoted, perceived, or achieved. Thus, we may consider this list neither as exhaustive of all desirable attributes of RCAs generally, nor as necessary features of a given RCA. Instead, let it serve as a loose, informal, generalized list of the purposes—what we might lump together as “shared values and goals”—behind many RCAs.⁸³

Keeping the above list of “shared values and goals” in mind, perhaps the most significant, and surely the most universal, of all attributes of RCAs generally is that membership is of a contractual nature. Unlike a person’s submission to local government, which will necessarily occur, to one local government or another, submission to (i.e. the decision to live in) a RCA is strictly voluntary.⁸⁴ In even

⁸³Much has been made in comparing these incentives, these “shared values and goals”, to those of the sorts of communities in Section I. Many such comparisons turn on the *gemeinschaft/gesellschaft* and instrumental/affective/moral distinctions described above. Some scholars of RCAs focus on the relative lack of affective, interpersonal relations or *gemeinschaft* functions, emphasizing instead their *gesellschaftian* and instrumental contractual basis and service-supply focus. Others, however, consider this one-sided approach overstated. They point out the potential *gemeinschaft* and affective qualities that within an RCA can forge strong interpersonal bonds. See, e.g., Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 39-43 (1989) (advocating a combination approach to understanding RCAs, pointing out that while they may be contractually created, an analysis of them based solely on a contractarian, public choice perspective ignores the interpersonal, *gemeinschaftian* insights often attributed to the Communitarian school).

In considering the features of RCA life below, it might be useful to keep in mind the following questions. Do RCAs, as many critics contend, have a relatively stronger focus on *gesellschaft* relations, rather than *gemeinschaft* relations, than the communities in Section I? As compared to cities generally? Do the potential members of RCAs put more emphasis in their decision-making process on instrumental, rather than affective or moral incentives? I have no intent to argue that one type of relations, or one kind of group orientation, makes for a stronger, better, or more just community than others. Rather, I hope only to illuminate the differences between RCAs and the communities in Part I.

⁸⁴For a fascinating debate on the relative voluntariness of RCA and city membership between two of the foremost legal scholars in the field of local government and RCAs, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); and Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982), as well as the *Comments and Replies* which follow. Additionally, James L. Winokur argues that voluntariness in RCAs is limited by the fact that oftentimes purchasers are not fully aware of the restrictions and obligations that come with membership. He writes: “Purchasers of servitude regime properties are often oblivious to applicable servitude documents, which in many states need not be called to a purchaser’s attention or even be recorded in order to remain binding. Servitude documentation is long, technical, boring reading for lay persons, who rarely retain attorneys to review home purchase documents.” James L. Winokur, *Association-Administered Servitude Regimes: A Private Property Perspective*, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM 85, 87 (U.S. Advisory Commission on Intergovernmental Relations ed., 1989). The large number of legal disputes over the enforcement of these servitudes, an issue discussed later in this section, is perhaps an indication of the validity and significance of this argument. Finally, Robert Jay Dilger argues that because, “in many areas of the country RCAs now dominate the local housing market and are increasingly offering fairly uniform levels and types of services,”

starker contrast, and directly related to the comparative purpose of this paper, unlike the informal submission to the authority of a community like those in Section I, membership in an RCA—along with the rights and responsibilities of membership—is documented and memorialized in writing. It is this writing, this enumeration of “can’s” and “cannot’s”, this balancing of rights between the association and the individual, as memorialized in the governing documents, that distinguishes the RCA from the Section I communities. As I intend to make clearer throughout this Section, the “shared values and goals” that help to define the RCAs may be termed as follows: a cooperative but rights-protective pursuit of individual, instrumental goals.

3. Communalism

The communities of Section I shared some aspect of communalism. Though the Oneida was more literally formal than the Amish, in the sense of strictly shared possessions, they both present what might be considered a broader sense of “communalism,” in their feelings of interconnectedness and interdependence among members. It was in part this communalism that allowed the Section I communities to merge *gemeinschaft* and *gesellschaft* functions, such that even the most menial and necessary of tasks worked to increase and strengthen interpersonal ties among members. RCAs present a different version of communalism—one that is in some sense more literally communal than, for example, Amish communalism (e.g. the possibility of shared ownership); but also one that is generally quite limited—arguably an interdependence or interconnectedness that extends no further than would be found outside the RCAs in mainstream America.

The basis of RCA communalism—in the very literal meaning of the word—lies in the sharing of facilities and services. As discussed above, RCAs come in a variety of forms, shapes, and sizes. One commonality, though, regardless of the legal structure of the Association, is that, in addition to the ownership of an individual residential unit, members gain access to, and therefore pay assessment fees for, common facilities and services.⁸⁵ The extent and range of provided common facilities and services varies greatly from one RCA to another.⁸⁶ Also, RCAs’ CC&Rs generally provide a quite rigorous set of rules and regulations, covering everything from guidelines for use of common areas, to mandatory external design

consumer choice does not really benefit from the proliferation of RCAs as much as it may seem in the abstract. DILGER, *supra* note 72, at 38.

⁸⁵Recall that under certain legal structures the common areas, and similarly the responsibilities and liabilities of shared services, are owned jointly in common interest by all members. In other legal structures, the Association itself owns the common areas with members contractually responsible for paying dues to the Association for upkeep.

⁸⁶For example, in a 1989 joint U.S. Advisory Commission on Intergovernmental Relations-Community Association Institute study of 422 CAI-member RCAs nationwide, 16 percent of respondents reported providing a lake or beach; 33 percent provide “play areas/tot lots;” 59 percent provide sidewalks; 67 percent provide a swimming pool; 45 percent provide tennis courts; 38 percent provide an indoor community center; and 37 percent have gates or fences. As for services, aside for the maintenance of the above indicated shared facilities, 72 percent provide trash collection; 48 provide snow removal; 31 percent provide security patrol; and 65 provide street repair. *RCA Characteristics and Issues*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM* 9, 13 (U.S. Advisory Commission on Intergovernmental Relations ed., 1989).

features of individual residencies. Not only does this likely inspire a sense of shared lifestyle that might be considered a “communal feeling,” but it is also an indication of the shared sense of importance placed on property value maintenance.⁸⁷ Finally, as will be discussed below, increased resident participation in decision-making is often offered as a perk of RCA life.⁸⁸ In all of these ways, then, a sense of interdependence, if not “communalism,” may generally be perceived in RCAs.

In understanding this list of communal features, however, what stands out is not so much those features that are included, but rather those that are seen in the Section I communities but are not apparent in RCAs. There is no ambition within RCAs to promote Association-wide primary groups.⁸⁹ Similarly, the mutual assistance of the Amish is nowhere discussed in the literature on RCAs. Where the communalism of the Section I communities inspired an infusion of *gemeinschaft* relations and affectivity into day to day menial tasks, the type of communalism of RCAs seems more strictly *gesellschaft* in nature, and more akin to Kanter’s description of instrumental goals. Individuals choose to become members, to become contractually interconnected to each other, for individual gains—to live in a safer environment, to live near a golf course, to maintain stable property values, etc. Likewise, the civic virtue of Association direct democracy seems instrumental as well, to be construed not so much as an opportunity to determine what is best for the community *as a community*, but rather what is best for the community, to be divided among and enjoyed by individual members.⁹⁰ Thus, as considered above in regard to the contractual nature of Association membership, the communalism of RCAs tends to be as, if not more, concerned with the individual benefits of cooperation and group living (the instrumental benefits of communal life), than it is with the more traditional sense of communalism found in the communities of Section I.

⁸⁷One of RCA’s major functions “is to protect the neighborhood’s aesthetic and real estate values by enforcing the covenants, conditions, and restrictions (CC&Rs) that are attached to each home’s deed.” DILGER, *supra* note 72, at 23.

⁸⁸“As one of the leading advocates of RCAs has argued, unlike local governments, RCAs provide citizens an opportunity to participate directly, at a more manageable scale, in the governance of their local neighborhood and community.” *Id.* at 132.

⁸⁹Granted, the level of interpersonal interaction that is likely heightened by the presence of common facilities and the “direct democracy” of Association governance potentially increases the bonds between members. However, private ownership of residential units, the contractual basis of membership, and the limited isolation from the rest of society, to be considered later in this section, reveal that this interpersonal connectedness extends only so far.

⁹⁰This is not to ignore the fact that members of the Section I communities, in deciding whether to join or to leave the community, likely made their decisions in part based on instrumental considerations. Indeed, Kanter’s work, emphasizing the existence of all three orientations, was based in large part on the Oneida Community. Rather, it is to point out, as was done earlier in this section, that there seems to be a somewhat more instrumentalism-heavy balance of considerations in RCAs (as can be seen, I argue, in the RCA version of communalism) than was seen to be the case in the communities of Section I. This argument will be fortified, I hope, throughout the remainder of this Section.

4. Isolation

As discussed briefly above, RCAs take numerous forms, and are found in all sorts of locations across the country. Some RCAs are “gated communities”, with actual, physical barriers isolating their residents from the outside world.⁹¹ Others, though not literally gated, are nonetheless physically isolated from the outside world, either by design (high-rise condominiums, for example⁹²), or location.⁹³ Others still, particularly where the Association is retrofitted into a more urban area (created after the residential structures and streets have already been built), construct barricades or guard posts at the points where privatized Association roads meet the busier non-Association streets.⁹⁴ Some, like Columbia, Maryland or Reston, Virginia, are so large⁹⁵ that average passers-by may have no idea they were in an RCA at all. Regardless of the form or layout of a given RCA, what is certain is that it was intentionally created, with the goal of separating itself, for any or all of a vast number of possible reasons, from others. In this sense, they all may be considered, in some way, and to varying degrees, isolationist.

For those RCAs without physical barriers, isolation is often achieved in other ways. In a manner similar to the *Ordnung's* isolating affect among the Amish, the aesthetic, use, and behavior restrictions of Association CC&Rs have what might be similarly experienced as an isolating effect. In many RCAs, for example, residential units are limited to a very small number of possible styles, colors and other such features, making clear the transition from the outside world to Association property. Among those RCAs that were planned prior to building (in contrast to those Associations established among already built units), street designs can have a strong

⁹¹A 1997 estimate figured there were around 20,000 gated communities, with more than three million units. BLAKELY & SNYDER, *supra* note 69, at 7. It defines a gated community as “residential areas with restricted access in which normally public spaces are privatized. They are security developments with designated perimeters, usually walls or fences, and controlled entrances that are intended to prevent penetration by nonresidents.” BLAKELY & SNYDER, *supra* note 69, at 2.

⁹²In a 1989 survey of RCAs Institute members, nine percent described their building structure as a “high-rise” (more than five stories). *RCA Characteristics and Issues, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM* 9, 12 (U.S. Advisory Commission on Intergovernmental Relations ed., 1989).

⁹³Though no statistics are available indicating the percentage of RCAs that are geographically isolated, a somewhat helpful indicator may be a 1989 survey of Community Association Institute member RCAs, of which 13 percent described their location as “rural.” *Id.* at 11.

⁹⁴University City, and Clayton, Missouri, wealthier sections of the St. Louis metropolitan area, are notable for their use of access restrictions such as barriers and chains blocking access to Association roads. Ronald J. Oakerson, *Private Street Associations in St. Louis County: Subdivisions as Service Providers, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM* 55, 58-59 (U.S. Advisory Commission on Intergovernmental Relations ed., 1989).

⁹⁵The populations of Columbia, Maryland and Reston, Virginia stand at around 97,000 and 55,700, respectively. COMMERCIAL ATLAS AND MARKETING GUIDE (Rand McNally & Co., 131st ed. 2000).

self-containing function.⁹⁶ While these characteristics may not literally isolate an Association (in the sense that outsiders may not be physically barred from entrance), they can nonetheless serve as psychologically isolating barriers.

Where in the Section I communities an informal and unofficial sense of isolation and other-ness served as a two-way barrier at the perimeter of their community-circles, keeping the outside world out and the community members themselves in, the isolation of RCAs differs in two significant ways. First, it is legal in nature—the creation of an Association establishes a legal boundary, inside of which is private property, owned either collectively or by the Association itself.⁹⁷ Thus, where the stark cultural, linguistic, and symbolic differences that defined and limited Section I community members' interaction with the outside world are less likely to exist between Association members and non-members,⁹⁸ laws of trespass and the like are available to serve a similar prophylactic function. Second, unlike the two-way isolation of Section I communities, in which members were not only protected from intrusion from without but also were prevented, to varying degrees, from crossing the same barriers, RCA isolation appears to be a one-way protection. Except perhaps in the largest RCAs (or, of course, in those populated by retirees), members leave every day to work outside of the Association. Similarly, though Associations may advertise the interpersonal bonds to be formed at the RCA swimming pool, or at Association meetings, it is highly doubtful that any would go so far as to discourage outside contacts. Likewise, there is no sense of moral superiority within RCAs, as was seen in both Section I communities; indeed, in most RCAs, there is likely any collectively understood morality by which to differentiate it from the outside world. Thus, RCAs do not perpetuate the types of instrumental, affective, and moral barriers to exit that exist within the Section I communities. "Communal" aspects, shared instrumental goals and increased participation (considered below) notwithstanding, RCA isolation (whether physical, psychological or legal) seems oriented solely towards preventing intrusion from without.⁹⁹

⁹⁶For example, streets may be constructed to surround the Association property entirely, or to be a self-contained offshoot, with but one entrance point. BLAKELY & SNYDER, *supra* note 69, at 8.

⁹⁷*But see*, Marsh v. Alabama, 326 US 501 (1946) (holding that the privately owned town in question, due to its size and public nature, is held to the Constitutional standards of a publicly owned town).

⁹⁸This is perhaps an overstatement. Many critics of RCAs argue that the exclusionary membership practices of some RCAs, most nefariously by race and class, contribute to and perpetuate a segregated America. Thus, where such is the case, one can imagine that obvious cultural and symbolic differences do exist between Association members and those who live beyond Association boundaries. The segregating effect of RCAs is a hugely significant and hotly contested topic in land use and local government policy. However, as it falls somewhat outside the scope of this paper, I regrettably decline to discuss beyond this brief mention the external effects of RCAs and their membership practices. For very compelling assertions of this argument, see generally, MCKENZIE, *supra* note 70; and BLAKELY & SNYDER, *supra* note 69.

⁹⁹This too, though perhaps true in its most literal sense, is still probably something of an exaggeration. Just as the existence of cultural differences between some RCAs and their environs likely work to keep out those who "don't belong," those sharp differences, one can imagine, might also work to reinforce and perhaps exaggerate the us-and-them sentiment felt

5. Organizational Structure

It would be impossible to discuss the many variations of RCA organizational and decision-making structures. Instead, much as I have done throughout this section, I will attempt to focus on generalities—on how Association “government” tends to be structured. In this vein, it is perhaps most convenient in embarking on this generalized description, to conceive of the Association much like a corporation, complete with a board of directors and officers. Likewise, property owners,¹⁰⁰ who upon purchase automatically and compulsorily become Association members, can be thought of as shareholders.¹⁰¹ Yet, where a shareholder’s interest in corporation decisions is generally purely fiscal, an RCA’s decisions often affect the daily lives of members in a much broader and more personal sense. Association governance focuses on three broad areas: management of commonly owned or shared property and facilities, provision of services, and enforcement of the CC&Rs, which regulate behavior, uses, and aesthetics.¹⁰² It is in this broad litany of Association powers and responsibilities, and their penetrating effects on members’ day-to-day lives, that the debate over the nature of Association governance, as either a private corporation-like entity or a quasi-public “private government,” finds its fuel.¹⁰³ It is also these same powers, and the increased decision-making participation the RCA form of

within the Community. As Dennis Judd writes, “the trappings of security that impregnate the new walled communities must [remind] the inhabitants, constantly and repetitively, that the world beyond their walls is dangerous.” Dennis R. Judd, *The Rise of the New Walled Cities*, in *SPATIAL PRACTICES: CRITICAL EXPLORATIONS IN SOCIAL/SPATIAL THEORY* 144, 161 (Helen Liggett & David C. Perry eds., 1995).

¹⁰⁰The possibility of membership and thus voting and participation rights for renting tenants (as opposed to property owners) has been widely debated. See, e.g., *supra* note 84 for a discussion of the Ellickson-Frug debate.

¹⁰¹Another consequence of the public-private debate discussed in FN 84 is the potential Constitutional uncertainty surrounding RCA voting schemes. Will the one person-one vote rule of *Reynolds v. Simms*, 377 U.S. 533 (1964) apply? Currently, many RCAs grant voting rights based on property ownership, either by the number of properties, the amount of property (square feet, etc.), or value of property. See, e.g., Katherine Rosenberry, *Condominium and Homeowner Associations: Should They Be Treated Like ‘Mini-Governments?’*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM* 69, 72 (U.S. Advisory Commission on Intergovernmental Relations ed., 1989).

¹⁰²DILGER, *supra* note 72, at 1.

¹⁰³As discussed above, this public-private debate permeates much of the RCA scholarship. Aside from the issues related to this debate considered above (FN 83), the public-private distinction also holds consequences for possible Association governance liability. In members’ suits against the Association, courts have wavered in the standard by which they judge Association action. Though courts typically attempt to distinguish between business decisions (which invoke corporation law-type standards, like the Business Judgment Rule), and “governmental” decisions (calling for some version of a Reasonableness standard), there is often a significant gray area blurring this important distinction. For more, see HYATT & FRENCH, *supra* note 67, at 319-25; WAYNE S. HYATT, *CONDOMINIUM LAW* 9, 10 (1984).

governance makes possible, that contributes to many decisions to become members.¹⁰⁴

The governing documents included in the deed of sale are the backbone of RCA government. They define not only who is a member (almost universally, property owners), but also the rights and responsibilities of membership. Much in the same way as a corporation's articles of incorporation and by-laws determine the rules, rights and responsibilities for shareholders, as well as the limits of power and legal liabilities of the board of directors and officers, the governing documents of the RCA (the Declaration, Articles of Incorporation, By-laws, etc.¹⁰⁵) serve the same function for the Association. They will generally provide for election processes and term guidelines for representation on the Board and as Officers; they will lay out rules for having meetings and for notice-of-meeting requirements; they will determine which decisions may be made by the Board alone, and which may only be made upon a vote of the membership as a whole.¹⁰⁶ Thus, while the size of a given Board, or the number of Officers, or the amount of responsibility placed on each member varies greatly from Association to Association, in the most general terms, the form of governance in RCAs may be said to be a corporation-style representative democracy, as based on and carefully outlined in the "voluntarily" signed and assented to governing documents.

6. Enforcement and Litigation

Throughout this section I have endeavored through comparison to the Section I communities, to consider the significant differences between the nature of those

¹⁰⁴Though this increased participation is often hyped by RCAs, and is also promoted on a theoretical level by many scholars, survey studies have found that membership participation in Association governance may not be so prominent. A 1989 study of 579 RCA board presidents found that "[t]he median percentage of people serving on boards, committees, or in some voluntary basis was 11 percent. . . . In 16 percent of the associations, fewer people ran for the board in the last election than the number of seats open." Stephen E. Barton & Carol J. Silverman, *The Political Life of Mandatory Homeowners' Associations*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM* 31, 35 (U.S. Advisory Commission on Intergovernmental Relations ed., 1989).

¹⁰⁵The recorded declaration of covenants for the community may include the articles of incorporation and bylaws for the homeowners' association, or they may incorporate them by reference. The declaration of covenants together with . . . the articles of incorporation and the bylaws for the association are known as the 'governing documents' for the community. Together, the governing documents combine to set out both the powers and the limitations on the powers of the homeowners' association." PETER M. DUNBAR & CHARLES F. DUDLEY, *LAW OF FLORIDA HOMEOWNERS' ASSOCIATIONS* 9 (Suncoast Professional Publishing Corp., 3d ed. 1997).

¹⁰⁶RCAs generally grant wide latitude to their Board of Directors and Officers in carrying out Association functions. Hyatt and French provide the following as an example of how an Association's by-laws might provide for such Board discretion: "The Board of Directors shall be responsible for the affairs of the Association and shall have all the powers and duties necessary for the administration of the Association's affairs and, as provided by law, may do all acts and things as are not by the Declaration, Articles, or these By-laws directed to be done and exercised exclusively by the members. . . ." HYATT & FRENCH, *supra* note 67, at 295. For a more detailed picture of the roles and responsibilities of the Board of Directors, Officers, and members generally, at least as is the case in Florida, see DUNBAR & DUDLEY, *supra* note 105.

communities and that of RCAs generally. Perhaps the most telling difference, and one that exists, at least in theory, in all Associations, may be found in the typical RCA mechanism for social control. The formal, contractual nature of RCAs—from membership, to the rights and responsibilities of members, to the rules and restrictions that order much of Association life—unlike the communities of Section I, ultimately requires and relies on external enforcement mechanisms. Thus, “[w]hen a resident fails to conform to an association’s rules, or challenges an association’s actions, either the resident or the association is likely to invoke the power of the outside government to void or enforce the covenants and bylaws that define the association’s power.”¹⁰⁷ It is the very nature of the contractual basis of RCAs, rather than the generally informal, unwritten, or perhaps even unspoken understandings of the Section I communities, that acknowledges the potential need for external enforcement and dispute resolution.¹⁰⁸

As considered briefly above, the notion that Association membership is entirely voluntary has been cast in doubt. From misperceptions of mandatory regulations and responsibilities, to the coercive effects of a housing market dominated by RCAs, there is no certainty that every member of a given Association will be willing, years into the future, to comply with every facet of the Association’s rules and requirements. Were such universal compliance that certain, there would be no need for covenants to begin with.¹⁰⁹ It is therefore in the very existence, and from Association to Association in the specific and often complex wording, of the governing documents, that the means of covenant enforcement is made known.¹¹⁰ To be sure, each Association’s enforcement procedures are different.¹¹¹ To avoid where

¹⁰⁷Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472, 485 (1985-1986) [hereinafter Note].

¹⁰⁸It is doubtless that informal social control, in the form of social pressure, gossip, and the like, is in effect in every RCA, much as it is anywhere in society. The absence of discussion of such informal controls from the literature on RCAs is, I imagine, to some degree due simply to the nature of the field. Where literature on the communities of Section I tends to take a more anthropological approach, it is my experience that the literature on RCAs comes from a more formal, legal and sociopolitical orientation. The more important point, however, is that while such informal social control may exist, Associations nonetheless feel the need to draft and implement written rules and procedures to be enforced by external forces, where the communities of Section I do not.

¹⁰⁹“If residential associations were simply voluntary associations, there would be no need of rules and covenants; in fact, however, they are also coercive associations.” Note, *supra* note 107, at 490.

¹¹⁰“The provisions of the declaration of covenants are enforceable as equitable servitudes, and they are covenants and restrictions with which the association, each officer and director of the association and each parcel owner and their visitors and guests must comply.” DUNBAR & DUDLEY, *supra* note 105, at 89.

¹¹¹To again return to the Constitutional uncertainties surrounding the public-private debate, courts have on numerous occasions either invalidated or refused to enforce RCAs’ rules and enforcement procedures. In finding invalid particular Associations’ regulations, the Courts have sometimes followed *Marsh v. Alabama*, 326 U.S. 501 (1946), restricting Association action (particularly in the largest, most self-sufficient RCAs) to the tighter standards of public governments. Elsewhere, in following the reasoning in *Shelley v.*

possible the high costs of litigation, many use as an initial enforcement mechanism the imposition either of fines or suspensions of privileges for the use of common facilities.¹¹² Significantly, most Associations provide for and ensure hearings, upon proper and sufficient notice, at which the alleged violator is given the opportunity to be heard in his or her own defense.¹¹³ Where such self-help is ineffective, many Association guidelines mandate the conflicting parties to participate in ADR before entering the courthouse.¹¹⁴

Regardless of the specific processes, hovering in the background of any RCA enforcement process is the threat of litigation, and, where the Association prevails in court, the uniquely coercive external force of the State. And lying at the heart of the legal system are the liberal ideals of moral neutrality and individual liberty and autonomy.¹¹⁵ Unlike the overwhelmingly group-oriented social control mechanisms of the Section I communities, the litigation process aspires more neutrally to balance the RCAs' need for rule enforcement and group harmony with the dissenting member's individual rights.¹¹⁶ Because RCAs have little or none of the moral orientation (and thus generally no affirmative moral or religious consensus) found in the Section I communities, the external force of the courts is favored by RCAs and their members for its perceived moral neutrality and objectivity. Likewise, without the strong group cohesiveness and affectivity found in the Section I communities, social pressure is not only undesired, but also, even were it a wanted form of

Kraemer, 334 U.S. 1 (1948) (though with varying degrees of strictness), Courts have refused to enforce certain restrictive covenants, holding that the very act of enforcement would constitute violative state action. See, e.g., Note, *supra* note 107. Katharine Rosenberry, *Condominium And Homeowner Associations: Should They Be Treated Like 'Mini-Governments?'*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM* 69 (U.S. Advisory Commission on Intergovernmental Relations ed., 1989). Aside from these instances, however, perhaps the more greatly impacting factor in informing the drafting of enforcement procedures is simply the free market laws of supply and demand—Associations want to draft procedures that, when considered by potential members (to the extent they in fact are considered), seem fair and reasonable.

¹¹²See, e.g., *DUNBAR & DUDLEY*, *supra* note 105, at 91.

¹¹³*Id.* at 92.

¹¹⁴For example, in response to growing numbers of suits between RCAs and their members, Montgomery County, Maryland, has established a non-binding, mandatory mediation/arbitration program in which all RCA disputants must participate before moving into the courts. *RCA Characteristics and Issues*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM* 9, 19 (U.S. Advisory Commission on Intergovernmental Relations ed., 1989).

¹¹⁵See, e.g., Ronald Dworkin, *Liberalism*, in *LIBERALISM AND ITS CRITICS* 60, 64 (Michael Sandel ed., 1984) (arguing that liberal equality requires "that government must be neutral on what might be considered the question of the good life.").

¹¹⁶Courts have voided member-challenged covenants and servitudes for a number of reasons, including, but not limited to, when they are found to be the following: (1) racially restrictive (*Shelley v. Kraemer*, 334 U.S. 1 (1948)); (2) arbitrary, in having no rational relationship to the purpose of the affected land (*Laguna Royale Owners Association v. Darger*, 174 Cal. Rptr. 136 (Cal. Ct. App. 1981)); and (3) unreasonable, in imposing burdens on the use of lands that substantially outweighs the restriction's benefits (*Nahrstedt v. Lakeside Village Condominium Association*, 878 P.2d 1275 (Cal. 1994)).

informal deviance control, it would likely be far less effective. Finally, with a level of isolation far less than that of the Oneida or Amish, the consequences of deviance for RCA members, even at their worst, are nowhere near the life-altering levels of Section I community members. The social control function of RCAs may be classified as an external, liberal, rights-based, individualized one because of its contrasts to the Section I communities, its full array of Due Process concerns, and its (at least perceived) aspiration to objectively apply laws to formalized categories of facts.

7. Summary

So what, then, does this reliance on litigation and external enforcement mean? Why is it such a significant point of departure from those communities in Section I? In answering this question, one needs only to reconsider Kanter's three group orientations. As I hope to have by now made clear, membership and participation in RCAs—on the whole—are primarily focussed on Kanter's "instrumental orientation." Granted, emotional, interpersonal, affective orientations at least sometimes have a role in members' decisions whether to join or remain in RCAs; as discussed above, these affective qualities are both hotly advertised and to some degree successfully realized features of RCA life.¹¹⁷ It is my contention, however, that the major factors in such membership decisions are individualistic, rights-based, instrumental considerations: property values, cost-effective services, safety, aesthetics.¹¹⁸ Individuals join RCAs for the individual benefits that membership provides. And thus it is this cooperative endeavor for mutually agreeable individual benefit that unites the community. Unlike the Section I communities, there is little sense that the whole is anything more than the sum of its parts. There is no shared belief system beyond the liberal individualism laid out in the rights-ordering governing documents¹¹⁹ to empower the community on the basis of its collective

¹¹⁷I remain somewhat skeptical about the frequency and intensity of these emotional interpersonal relationships. Most basically, it should be remembered that people join RCAs generally without knowing the other members. Stephen E. Barton and Carol J. Silverman discuss a number of factors that from their research of numerous RCAs they believe to contribute to social barriers between members. Stephen E. Barton & Carol J. Silverman, *The Political Life of Mandatory Homeowners' Associations*, in *RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM* 31 (U.S. Advisory Commission on Intergovernmental Relations ed., 1989).

¹¹⁸I would like to make very clear that my intention in distinguishing between these "individualistic, right-based, instrumental considerations", and those more "group-oriented" is not to disparage RCAs or their members. It would be foolish to think that we all could find our own Oneida Community—and for those of us (the vast majority!) who do not find comfort in a community like those of Section I, the liberalism and right-oriented, yet cooperative nature of the RCA may be quite appealing. Accordingly, I am simply trying to point out what I consider a major difference between two different (and equally potentially legitimate) community types.

¹¹⁹I use the term "liberal" here with caution. It is quite possible that the restrictions of the "rights-ordering governing documents" may be quite non-liberal indeed. As discussed above, RCAs distinguish themselves from each other on numerous bases, quite likely sometimes to include notions of shared values and the "non-liberal" enforcement of them. Rather, I use "liberal" to point out that these potentially non-liberal restrictions are (at least in theory) known to the potential members. Thus, where potential members have the freedom to choose

moral strength to reprimand a wayward member. Where an RCA member finds a particular restriction too onerous, he or she will deviate from it without concern for defying the moral authority. Likewise, where the Association's implementation of the external social control function is perceived as sufficiently threatening, the threatened member, on the basis of an individually/instrumentally-oriented analysis, will either conform or quit the community.¹²⁰ Far less severe among most RCAs are the moral, affective, and instrumental barriers that prevent individuals' exit from the Section I communities—there is no strong moral orientation, casting a notion of moral/religious inferiority over the outside world; and there is no intense isolation, disabling members from either relating to people or functionally making a living beyond the boundaries of their community-circle.

It is no great surprise that where it is these rights-based interests that compel membership, rather than the shared community beliefs or strong interpersonal relations and interdependence—Kanter's moral and affective orientations—more frequently found in the Section I communities, protection of those rights is perceived as necessary.¹²¹ And to protect their rights when conflict arises, RCAs and their members look, ultimately, to the state-backed coercive power of the courts. Indeed, one could further argue that the very act of entering by covenant into an RCA is a significant symbolic gesture emphasizing the contractual nature of the community at the expense of the affective or moral possibilities.¹²² Where membership within the Section I communities is likely attracted and maintained on the basis of moral and affective orientations ("These are my people", "This is my lifestyle", "This is the right way to live"), this same function within RCAs is probably more heavily oriented towards individualistic instrumentalism. Thus we see that, just as was the

from numerous communities—with knowledge of the restrictions and potential non-liberal leanings of each community—they enjoy a liberal freedom, as Charles Tiebout might say, "to vote with their feet." Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

¹²⁰And recall, as discussed briefly above, that for RCA members the side of the equation warning against deviance—the consequences of deviance and possible alienation or excommunication—does not compare to the respective cautioning factors for members of the Section I communities.

¹²¹This is not to ignore the point that liberalism itself may be considered a "shared community belief." Indeed, this idea will be considered in a more head-on fashion below. For purposes of this Section, I wish only to make the distinction between the "shared community belief" of liberalism and the "shared community beliefs" of the Section I communities. As I find this distinction a relatively intuitive one to make, but a far more difficult one to put fruitfully into words, perhaps it will suffice to make the following hypothetical observation: it is far easier to imagine a Communitarian living happily in an RCA than it is to imagine a liberal atheist living happily among the Amish. In fact, two scholars of the RCA movement have noted that the behavior of members is not always so liberal to begin with, finding in their study of numerous RCAs that "[m]embers support the restrictions inherent in the CID as they apply to others, but resent the restrictions on their own activities." Barton & Silverman, *supra* note 117, at 31, 35.

¹²²See, e.g., James L. Winokur, *Rejoinder: Reforming Servitude Regimes: Toward Associational Federalism And Community*, 1990 WIS. L. REV. 537 (1990) (in part lamenting at least one example of what he perceives as an unfortunate reliance on legal remedies, rather than informal, interpersonal ones, for RCA members' conflicts).

case with the communities of Section I, it is the core community values of RCAs—the cooperative but rights-protective pursuit of liberal, individualistic and instrumental goals—that informs the RCA model of social control. And yet at the same time, the use of this rights-based, liberal social control mechanism works to protect and perpetuate those same core values. In this sense, just as the social control mechanisms of Section I were symbiotically related to the natures and functions of those communities and the collective ideologies that formed them, so too does the external, liberal, rights-based social control of RCAs both rely on and perpetuate an individualistic, instrumental, rights-oriented mentality and a predominantly *gesellschaft* nature.

IV. SECTION III.

A. *Harvard College*

1. Background¹²³

Harvard College was founded in 1636, named for its first donor, the Reverend John Harvard, who left to the school his personal library and half his estate. The College expanded into a multi-disciplinary university during the late-18th and 19th Centuries, beginning with the creation of a medical studies graduate program in 1782, law and divinity programs in 1816 and 1817, respectively, and a main library building in 1841. The University continued to grow throughout the 20th Century: the professional schools acquired new buildings over its first three decades; Widener Library was constructed in 1915; The Fogg Museum was built in 1927. In 1943, the instruction of Radcliffe¹²⁴ undergraduates became the formal responsibility of the Harvard Faculty of Arts and Sciences, and over the next three years nearly all courses were made coeducational. Twenty years later, Radcliffe graduates were awarded Harvard degrees. In 1999, the merger of the two schools was effectively completed, as Harvard College assumed full responsibility for the education of undergraduate women, and Radcliffe College was transformed into the Radcliffe Institute for Advanced Study, a non-degree-conferring interdisciplinary center for advanced study across an array of fields.

Today, Harvard University consists of Harvard College, the Graduate School of Arts and Sciences, as well eight other full faculties. Its campus area, split between Cambridge and Boston, covers about 500 acres. The University has a regular enrollment of approximately 17,000 full time students, and a faculty and staff numbering about 20,000. It is likely the single most recognized and well-known academic institution in the world.

¹²³All the information in this Background subsection was obtained from the Harvard University web site, at <http://www.registrar.fas.harvard.edu/handbooks/student/introduction.html> (last visited March 1, 2002).

¹²⁴Radcliffe College, Harvard College's sister-school, was founded in 1879. See HARVARD UNIVERSITY, FACULTY OF ARTS AND SCIENCES, STUDENT HANDBOOK, at <http://www.registrar.fas.harvard.edu/handbooks/student/introduction.html> (last visited March 1, 2002).

2. Individualism and Self-Realization

Harvard College, like any college, is more than a simple collection of classes, students and teachers. It is a particular and intentionally created and maintained environment, and within that environment it is an academic community. Unlike the less formally established communities of Section I,¹²⁵ Harvard College is a single community with available, official statements of purpose and goals. For example, as stated in the Faculty of Arts and Sciences Student Handbook:

A fundamental goal of the College is to foster an environment in which its members may live and work productively together, making use of the rich resources of the University, in *individual and collective pursuit* of academic excellence, extracurricular accomplishment, and personal challenge. In the words of the Resolution on Rights and Responsibilities adopted by the Faculty of Arts and Sciences on April 14, 1970, 'By accepting membership in the University, an individual joins a community ideally characterized by *free expression, free inquiry, intellectual honesty, respect for the dignity of others, and openness to constructive change.*'

For this goal to be achieved, the community must be a *tolerant* and *supportive* one, characterized by *civility* and *consideration* for others. Therefore the standards and expectations of this community are high, as much so in the quality of interpersonal relationships as they are in academic performance.¹²⁶

The above statement provides insight into the dualism and potentially conflicting ambitions of the Harvard College community. Many of the ideal characterizations above—"free expression," "free inquiry"—may be labeled as liberal, individualistic ones. Meanwhile, others of the aspirations—"to foster an environment in which its members may live and work productively together . . . in individual and collective pursuit of . . . excellence . . ."—hint at the communalism and group orientation of the Section I communities. As I hope the discussion in this Section will show, the Harvard College community is an interesting mixture of the instrumentalism and right-based *gesellschaft* relations common to the RCA's, and the group-oriented, ideology-based *gemeinschaft* orientation that marks the Section I communities.

Where most RCA's are predominantly *gesellschaft*-based, formed around cooperative, corporation-like efforts to realize individual aims, Harvard College (though not without its instrumentalism and solely instrumentally-minded members¹²⁷) puts particular emphasis on interpersonal interaction and exploration. Indeed, the Resolution on Rights and Responsibilities, cited above, raises this

¹²⁵The College's charter, under which it still operates today, was granted by the Massachusetts Bay Colony in 1650, with subsequent amendment and further definition in the Massachusetts Constitution of 1780. *See id.*

¹²⁶FACULTY OF ARTS & SCIENCES, FAS HANDBOOK ch. 4 (2001) (italics added).

¹²⁷Though instrumental orientations take numerous forms, some likely examples to be found among Harvard College community members might include the following: the future personal benefits of a Harvard degree, desire to please parents and family, wanting to live in the Boston area, etc.

aspiration for the collective creation of a “super-liberal” environment arguably to the level of an ideology: “The University . . . has a special autonomy and reasoned dissent plays a particularly vital part in its existence. . . . The University must affirm, assure and protect the rights of its members to organize and join political associations, convene and conduct public meetings, publicly demonstrate and picket in orderly fashion, advocate, and publicize opinion by print, sign, and voice.”¹²⁸ Some RCAs may come close to this conception of a collectively created and maintained environment. But where RCAs as a whole can reasonably be analogized to a corporation (and the essentially faceless, though cooperative, relationship between shareholders/RCA-members), it is an essential characteristic of the Harvard College community that its members share (rather than merely cooperate) in the formation of a particular environment.

Yet while Harvard College may not be the strictly *gesellschaftian* community that many RCAs may be, it also does not fit neatly into the group of communities in Section I. This is so mainly for three different reasons. First, though Harvard does share with those communities a strong focus and reliance on shared beliefs, it is the nature of these beliefs that distinguishes it. Unlike the Section I communities’ emphasis on submission to the group, the underlying ideology that unites the Harvard community is, in the goal it envisions, essentially an individualistic one—the shared aspiration towards, and collective maintenance of an environment that promotes, individualistically-minded self-realization. Second, for a number of reasons to be considered more fully below (the transient nature of the student body, existing external ties, family pressure, to name just three), Harvard College community members are likely to place more weight on the instrumental purposes behind their membership than their Section I counterparts. And third, also due to Harvard College’s less intense level of isolation, the consequences of student deviance—and the risk of alienation or perhaps expulsion from the community—is surely understood in far less drastic terms as it is among the members of the Section I communities. It is thus my contention that the Harvard College community is a unique synthesis of *gemeinschaft* and *gesellschaft*: it is a community of both instrumental and non-instrumental orientations, bound by the community-wide creation of an environment amenable to the collective ideological aspiration of individualistic self-realization.

3. Communalism

The communalism of Harvard College is a blend of the many variations on communalism that have been considered thus far. Like the RCAs, the members of the Harvard College community enjoy the shared use of common facilities and services—from athletic facilities to libraries to computer services to common grassy areas like the Harvard Yard.¹²⁹ While these common areas and facilities may not be

¹²⁸ *Resolution on Rights and Responsibilities*, approved and signed by the Faculty of Arts and Sciences on April 14, 1970. See HARVARD UNIVERSITY, FACULTY OF ARTS AND SCIENCES, RESOLUTION ON RIGHTS AND RESPONSIBILITIES (1970), at <http://www.registrar.fas.harvard.edu/handbooks/student/chapter4/community.html> [hereinafter RIGHTS AND RESPONSIBILITIES].

¹²⁹ HARVARD UNIVERSITY, FACULTY OF ARTS & SCIENCES, REGULATIONS CONCERNING THE USE OF UNIVERSITY RESOURCES, at <http://www.registrar.fas.harvard.edu/handbooks/student/chapter4/conduct.html> (last visited March 1, 2002) (including a section on regulations concerning the use of university resources, focussing most particularly on

owned by the students—and are accordingly less likely to inspire as deep a sense of interconnected responsibility for their maintenance as would be found in most RCAs—their common use of and often significant reliance on these facilities are likely to engender, if not economic interdependence, some sense of social interconnectedness and communalism.

Like the Oneida Community, Harvard College students live together,¹³⁰ eat meals together, attend classes together, and often spend most of their extracurricular time together as well. Though Harvard College is not literally self-sufficient in the Oneidan sense (no food is produced, etc.), the level of service provision and the variety of outlets, pursuits, and activities available within the community make it possible for its members to remain within the campus indefinitely. In this sense, the College may be compared not only to the Oneida, but also to at least some of the more self-contained RCAs.

However, unlike the Oneida, who endeavored to create a community-wide primary group, Harvard College is subdivided in numerous different ways. Most significantly, there are more than 6700 College students.¹³¹ Though the College campus is relatively compact compared to many American colleges, at almost no time are all the members of the Harvard College community together in the same room or outdoor area. Rather, the community is divided into classes. And probably more significantly, aside from first-year students it is divided among the Houses (discussed below). Academic areas of concentration, extracurricular activities and clubs, and other informal divisions also work to create subgroups within the community. Also, unlike all the Section I communities, and perhaps also unlike RCAs, the Harvard College student community is a transient one, as very few students remain members for more than four years. One imagines that this factor could not help but limit the intensity of interconnectedness and communal responsibility felt between students.

Yet while the transience of the community members, and the numerous divisions within the community as a whole, may serve in some way to diminish the overall sense of communalism at Harvard College, there are a number of significant commonalities among most, if not all, students that combats these de-communalizing factors. Perhaps most significantly (and found to this degree in none of the other communities above, except perhaps for some particularly specialized RCAs), there is a homogeneity of age among College community members. Though this fact alone by no means ensures any increased sense of communalism, it likely leads to a heightened similarity in tastes, activities, and interests that serve to enhance communalism. Similarly, this homogeneity of age (in the sense that the majority of community members are young adults, generally living on their own away from home for the first extended period of time) also works to emphasize the shared ambition towards self-realization discussed above. In consideration of this aspiration, the Resolution on Rights and Responsibilities (cited in the block quote

regulating use of the libraries and computer networks, but also on activity in common areas, for example prohibiting bicycle riding in Harvard Yard. College rules and regulations like these are quite similar to those concerning regulation of common facility use of the RCA's).

¹³⁰All but a very few undergraduates live in on-campus dormitory housing. *THE INSIDER'S GUIDE TO THE COLLEGES* 426 (2001).

¹³¹*Id.* at 424.

above), places special emphasis on the following rights-based freedoms: “freedom of speech and academic freedom, freedom from personal force and violence, and freedom of movement,” such that “[i]nterference with these freedoms must be regarded as a serious violation of the personal rights upon which the community is based.”¹³² Thus, to summarize, communalism may be perceived at Harvard College in four ways: (1) communal living and shared facilities and common grounds; (2) the self-contained nature of campus life; (3) the relatively homogenous nature of student community members; and (4) the common, cooperative and interdependent—albeit individualized—pursuit of self-realization. With these four characteristics in mind, we can see how Harvard College’s brand of communalism is a neat blend of both the *gesellschaft*-oriented, cooperative communalism of most RCAs, and the more *gemeinschaft*-inspired and –inspiring version of the Amish and Oneida.

4. Isolation

Harvard College is located in Cambridge, Massachusetts, a city of more than 90,000 people,¹³³ directly across the Charles River from Boston. Though many of the College’s buildings are scattered throughout the Harvard Square area of Cambridge, the heart of the College—those buildings on and around Harvard Yard—is enclosed by a series of metal gates. Presumably, anyone may pass through these gates and into the yard. Yet, their mere presence (and that of the Harvard University campus police officers regularly positioned at the major gate openings) surely has some affect on both Harvard College students and non-students alike. Additionally, beyond the gates, some College buildings, the residence Houses in particular, possess similar external features likely to indicate to passers-by an affiliation with Harvard. In part because of these distinctively collegiate buildings and external features, as well as Harvard’s long history and renown, Harvard University (and particularly the College) takes on an almost ubiquitous presence in the Harvard Square area of Cambridge. Yet, because many of the buildings outside Harvard Yard bear no obvious indication of affiliation with Harvard, as ever-present as Harvard may be in and around Harvard Square, there is often no telling whether any given building is or is not part of Harvard College. Accordingly, the distinction between the Harvard College community and its surrounding environs—the distinction giving rise to isolation—is, at least in a physical sense, not always clear.

Even beyond this strictly physical/structural sense of isolation, the distinction between College students and non-students, while obvious to some, can still be somewhat vague. As discussed above, the particular homogeneity of the Harvard College population—most particularly in age and tastes, but also as a result of similar day-to-day activities—Harvard College students are by appearance, though surely with exceptions, a relatively distinct community. Yet, in part because of the large number of colleges in Boston, while it may be possible generally to tell college students from non-students, to distinguish Harvard College students in particular is not always so easy. In much the same way that Harvard College buildings seem omnipresent throughout the Harvard Square area of Cambridge, so too does one get the sense that, while surrounded by Harvard College students, it may not be possible

¹³²See RIGHTS AND RESPONSIBILITIES, *supra* note 128.

¹³³COMMERCIAL ATLAS AND MARKETING GUIDE, *supra* note 95, at 376.

to pick them out with perfect accuracy. In this sense, the non-physical/structural isolating features of the Harvard College community fall somewhere between the very overt traits of the Amish and the nearly imperceptible identifiers of most RCA members. Significantly, much like the one-way version of isolation found among many RCAs (though to far lesser degree), one might suppose that Harvard College students have an easier time picking out other Harvard College students than would a non-student.¹³⁴ To summarize, then, it might be said that, in comparison to the communities considered above, the isolation of the Harvard College community is (1) not as spatially constructed as the Oneida or some of the more secluded RCAs; (2) somewhere between the two-way isolation of the Amish, open and obvious to outsiders, and the more one-way isolation of the RCAs, whose members' identities (as RCA members) are frequently not identifiable to non-members; and (3) from the perspective of the members, more self-contained and broadly life-encompassing (and thus probably more identity-creating) than most RCAs.

5. Organizational Structure

Before considering the organizational structure of Harvard College, an important distinction must be made between, on the one hand, the relationship between the College community considered in this section (the student body) and the governing structure, and on the other hand the relationship between the various communities considered in the other sections and their respective governing structures. Where in those communities the participating decision-makers are all also members of the community, the majority of key decision makers at Harvard College are not members of the Harvard College student body. Though students do have input into the decision-making and governing structures and processes, either through formal participation¹³⁵ or through informal advocacy and protest, students are not generally the essential players in Harvard College governance. In some sense this distinction does skew somewhat the comparison between Harvard College and the "self-governed" communities in the previous sections.¹³⁶ Yet, because accepted students

¹³⁴This is likely to be true for several reasons. First, and most simply, students are likely to recognize each other from classes, activities or Houses. Also, it seems reasonable to presume that students will have more familiarity with informal indicators of membership: t-shirts that hint at membership, particular books, verbal indications of membership, etc

¹³⁵The Harvard-Radcliffe Undergraduate Council was established in 1982 "to serve as an advocate for student concerns, organize campus-wide social events, and provide funding for student organizations." HARVARD UNIVERSITY, FACULTY OF ARTS AND SCIENCES, HARVARD-RADCLIFFE UNDERGRADUATE COUNCIL, at http://www.registrar.fas.harvard.edu/handbooks/student/chapter5/student_government.html (last visited March 1, 2002). The Council is comprised of fifty-one members, some elected by the student body as a whole, others from the residential Houses, or from "freshmen districts." *Id.* The Council is divided into three committees: Student Affairs, Campus Life, and Finance. *Id.* Each year, members of these committees are selected to participate on the Faculty's three advisory committees: the Committee on Undergraduate Education, the Committee on House Life, and the Committee on College Life. *Id.* Additionally, the Council is responsible for supervising elections of undergraduates to participate in numerous student-faculty standing committees. *Id.*

¹³⁶Though do recall that some critics have questioned the common conception that participation in local governmental decision-making is enhanced by RCAs. Likewise, remember from Section I that while many decisions were made in an egalitarian, democratic

have the freedom to choose to become members of the Harvard College community (to enroll),¹³⁷ it is not unreasonable to acknowledge that these students have chosen Harvard, at least in a theoretical sense, because they were comfortable with the governing structure. In this sense, though students may not be directly involved in the organizational and decision-making structure, it may be presumed that there is no less of a link between the Harvard College community and its governance than in the other “self-governed” communities.

That said, what follows is a brief account of Harvard College’s place within the University’s organizational structure, as well as a description of the core decision-making bodies within the College itself. Harvard College, along with the Graduate School of Arts and Sciences, comprise the two main sub-bodies of the Faculty of Arts and Sciences (FAS). FAS is the largest of the University’s nine faculties, and is under the direct control of the Dean of the Faculty of Arts and Sciences. Beyond the authority of the Dean, the many functions of FAS are overseen by the President and Provost of the University, its two Governing Boards, the Harvard Corporation, and the Board of Overseers.

Within Harvard College, the head administrative official is the Dean of Harvard College. Under his authority, a number of other Associate and Assistant Deans hold offices, each with a specified area of responsibility, including oversight of student activities, housing, financial aid, service and volunteerism, coeducation, and the like. The office of the Dean of Harvard College also has authority over such specific offices as the Registrar of the Faculty of Arts and Sciences, the Office of Career Services, and the Freshman Dean’s Office. Finally, also under the Dean’s direction is the Administrative Board, which implements and enforces academic rules and regulations.¹³⁸ Perhaps with even more direct impact on the daily lives of students, after their first year (during which time they are most directly under the purview of the Freshman Dean’s Office), they are divided up among thirteen residential Houses. Each House is directed by a House Master, an Allston Burr Senior Tutor, and numerous resident and non-resident tutors, who together direct the majority of student social and extracurricular life.

way, this process was in a sense really only partially democratic, with few community leaders making (or at least making recommendations as to) the major decisions.

¹³⁷For a number of obvious reasons, this may be something of an overstatement. First, there are many factors besides governing and decision-making structures that, one imagines, are more heavily weighted in potential students’ minds when they decide to enroll at Harvard. Second, it is quite unlikely that potential students, in deciding whether to enroll at Harvard, know anything at all regarding the College’s systems and processes of governance. Third, even with this information, it is doubtful that any other similarly situated college has a system of governance that differs from Harvard’s in any meaningful way. Finally, those students who do enroll, only to discover that they are in fact not comfortable with Harvard College governance, face numerous barriers (real and perceived) either to transferring to another college or dropping out altogether.

¹³⁸The Administrative Board will be considered in more detail below.

6. Administrative Board

The central formal mechanism of social control within the Harvard College community is the Administrative Board.¹³⁹ The Board, created by and deriving its authority from the Faculty of Arts and Sciences, is comprised of two groups: (1) teaching faculty and senior administrators; and (2) Senior Tutors and Assistant Deans of Freshmen. Thus, Board membership is split between the “authority figures” of the faculty and administration and the more personally familiar (significantly, though, non-student) Tutors and Assistant Deans. Though the Board serves numerous purposes, this paper will focus particularly on its responsibility for “any undergraduate disciplinary case for which there is governing faculty legislation and/or for which there is precedent for interpreting and applying the rules and standards of conduct of the College.”¹⁴⁰ (Cases for which there is no clear precedent, policy, or faculty legislation have recently come under the authority of the Student-Faculty Judicial Board, which will be discussed below.)

Once information of transgressive behavior has been brought to the attention of the violating student’s resident dean, the procedure of the Administrative Board ordinarily begins with an informal conversation between the allegedly deviant student and that dean, during which the two will discuss the incident in depth to ensure a clear understanding. Next, the student is asked to prepare a statement to be reviewed by the Board, with three goals in mind: (1) tell the story in full; (2) reflect on the event (“[Y]ou should state clearly your understanding of why the actions taken were in violation of a rule or standard (if they were)...and what you think about the event after time for reflection”); and (3) draw some lessons (“It is important for

¹³⁹As I pointed out in regard to the devices of social control within RCAs, there are surely informal mechanisms—gossip, “peer pressure”, etc.—at work in the Harvard College community. Just as with the RCAs, however, the mere existence of more formal controls, here in the form of the Administrative Board, is an indication that the informal social control functions within the community are considered (at least by the administration) insufficient. Yet, from the perspective of the potential deviant, there is also an additional external informal factor at work at Harvard College which is likely absent from the RCA’s. Adding to a student’s equation in deciding whether to deviate—and thus risk punishment, or even expulsion—students generally must also consider the often overwhelmingly persuasive force of their families. In comparison, it is doubtful that being made to leave an RCA carries with it the same sort of social weight as being expelled from Harvard College. This additional factor may be imagined as added weight in favor of conformity on the potential deviant’s decision-making scale. This consideration, as well as the similar factors involved in both the relative youth of Harvard College students and the risk of serious future harm that likely comes with official sanction or expulsion, will be discussed in more detail in the concluding remarks at the end of this paper.

¹⁴⁰*See* HARVARD UNIVERSITY, FACULTY OF ARTS AND SCIENCES, THE ADMINISTRATIVE BOARD OF HARVARD COLLEGE, at <http://www.registrar.fas.harvard.edu/handbooks/student/chapter4/adboard.html> (last visited March 1, 2002). The Board also focuses its efforts on cases of academic review of unsatisfactory records. While this paper will not consider this area of Administrative Board jurisdiction, it should be noted, based on the academic nature of the Harvard College community, that such unsatisfactory academic performance (to the extent that it falls short of the aspirations of individual community member behavior) is not wholly outside the scope of this paper. Yet, because unsatisfactory academic performance is not necessarily deviance *per se*, in that it does not often threaten the nature of the community, it has no useful analogue in the other communities considered above.

you to think about . . . how you might behave differently in similar circumstances in the future . . . and . . . how this experience has caused you to change or grow.”¹⁴¹ FAS materials explain that the latter two goals are set in light of the Board’s “interest[] in a larger educational view of student behavior.”¹⁴²

If, after the initial in-depth conversation and drafting of the student statement, formal discipline is thought likely, the student has the right to appear before the board when the case is presented. He or she has the right to have another University officer present to serve as personal adviser. Once at the hearing, the resident dean makes a preliminary oral report of his or her findings, after which, the student may make opening remarks. The Board may then question the student, after which the student is given a final opportunity to be heard. When the hearing is concluded, the student leaves the room, and the Board begins its deliberations. Where upon deliberation the Board determines that wrongdoing has occurred, and that disciplinary action is appropriate, it may choose from five options with increasing severity: (1) warn or admonish; (2) disciplinary probation; (3) requirement to withdraw for disciplinary reasons (where readmission, after time away from Harvard, is likely); (4) dismissal (where readmission, after a time away, is possible, though only upon a vote of the Faculty of Arts and Sciences); and (5) expulsion (without possibility of readmission).¹⁴³ Though Board decisions are considered final, FAS may review and, if it deems proper, amend any Board decision.¹⁴⁴

“Recognizing that there are some issues that the Administrative Board’s standard procedures could not address appropriately,” in 1987, the Faculty established the Student-Faculty Judicial Board.¹⁴⁵ In taking on such unprecedented cases, then, FAS acknowledged that one of the core effects of the Board would be in effect establishing community standards on the basis of its decisions.¹⁴⁶ With this in mind, the Board’s membership is divided equally among six faculty members and six students, all selected by lot.¹⁴⁷ Yet while this more student-inclusive mechanism is a significant symbolic gesture to the merits of having student participation in determinations likely to affect community norms and standards, in its thirteen year existence, the Student-Faculty Judicial Board has heard but one single case. Accordingly, its symbolic significance notwithstanding, further consideration of the Board seems unnecessary.

¹⁴¹FACULTY OF ARTS & SCIENCES, THE ADMINISTRATIVE BOARD OF HARVARD COLLEGE: A USER’S GUIDE FOR STUDENTS 6 (2001) [hereinafter USER’S GUIDE].

¹⁴²*Id.*

¹⁴³In the 1999-2000 academic year, of 113 affirmative disciplinary cases brought before the Administrative Board, in fourteen cases the Board took no action, sixty-four cases resulted in a decision to admonish, twenty-one cases ended in probation, and in fourteen cases the student was required to withdraw. USER’S GUIDE, *supra* note 141, at 21.

¹⁴⁴*Id.* at 7.

¹⁴⁵HARVARD UNIVERSITY, FACULTY OF ARTS AND SCIENCES, THE STUDENT-FACULTY JUDICIAL BOARD, at <http://www.registrar.fas.harvard.edu/handbooks/student/chapter4/adboard.html> (last visited March 1, 2002).

¹⁴⁶*Id.*

¹⁴⁷In addition, “the Dean of [Harvard] College and the Administrative Dean of the Graduate School [of Arts and Sciences will serve as] *ex officio* non-voting members.” *Id.*

Just as the Harvard College community may be seen, in certain respects, to be a synthesis of those features predominant in the Section I communities and those predominant in the RCAs, so too may its main social control mechanism—the Administrative Board—be considered as such a synthesis of those two communities' respective mechanisms. In some respects, the Administrative Board is reminiscent of the processes utilized by the RCAs. With its emphasis on procedural safeguards and the rights of students—the right to ask that the case be heard by the Faculty-Student Judicial Board; the right to appear and be heard by the Administrative Board; the right to have an advocate present at the hearing; the Board's following, where possible, of prior precedent; the right to appeal the Board's determination to FAS—in certain respects the Harvard College social control function, like that of the RCAs, may be described as formal, procedural, and rights-oriented. To the extent that this is the case, it is evidence that, like the RCAs and unlike the Section I communities, social control within Harvard College may be considered *gesellschaftlich*—its formality, strict procedure, aspirations of neutrality, and minimal participation by other members of the community work against the use of or reliance on interpersonal, group-first *gemeinschaft* relations.

In other respects, however, the Administrative Board seems more similar to the processes of the Section I communities. First, though there is some detailed explication of students' rights, the procedures of the Administrative Board lack the full litany of procedural safeguards present in actual litigation: there is no absolute right to present and/or cross-examine witnesses; there is no jury of peers (indeed, with the exception of the little-used Student-Faculty Judicial Board, there is no participation in the process by fellow-students); there is no absolute right of appeal. Second, as mentioned briefly above, of the 113 affirmative cases heard in the 1999-2000 academic year, only fourteen resulted in a requirement to withdraw, none of which were of the variety making readmission anything short of probable.¹⁴⁸ In fact, more than half the 113 cases resulted in a decision to "admonish," which, not considered a formal disciplinary action, is more a statement to the student and the community condemning the student's actions. Third, as seen above, in the goals of the student statement, the Administrative Board distinguishes itself from a court of law in that it not only wishes to determine "guilt" or "innocence," but also, in line with its role within an academic institution, hopes to inspire the deviant student to reflect on and learn from his or her transgressions. Finally, like the Section I communities (and unlike the RCAs), the Administrative Board is an internal social control mechanism.¹⁴⁹ As such, it may create its own precedent, based on the collective norms and ideologies of the community. As particularly seen in the 1987 decision to establish the Student-Faculty Judicial Board, the Harvard College mechanism for social control is one which aspires to make determinations—and

¹⁴⁸Of sixty-three Petitions for Readmission heard in the 1999-2000 academic year, only six were denied. USER'S GUIDE, *supra* note 141, at 21.

¹⁴⁹Where violations of law have occurred, the Administrative Board, though generally allowing first for the completion of court proceedings, will nonetheless proceed with the Administrative Board hearing, to pursue its own disciplinary determination. As the User's Guide explains, "The College ordinarily will defer consideration of a case at least for a reasonable period of time if a criminal investigation or proceeding is pending in relation to a disciplinary case." *Id.* at 7.

thereby affect future community behavior—in a manner coordinate with and informed by the shared norms and values of the community.

7. Summary

I have attempted to show that both the underlying values and aspirations of the Harvard College community and its social control mechanisms represent a synthesis of the *gemeinschaft* and the *gesellschaft*. Like the dominant characteristics of the Section I communities, the Harvard College community is marked by such group-oriented notions as shared common facilities, living quarters, and services. For many students, like the members of the Oneida Community, Harvard College is a self-contained and isolated environment. Likewise, due in part to the homogeneity of age, the commonality of pursuits among Harvard students, and the isolation engendered by these factors, identity as Harvard College community members is likely quite strong. Perhaps most significantly, as evidenced by many of the official statements considered above, the Harvard College community as a whole pursues a shared aspiration: collectively to create an environment in which individuality and self-realization may flourish.

On the other hand, the Harvard College community is in certain respects not unlike the generalized account of the RCAs described above. The instrumental benefits of membership in the Harvard Community are likely central factors in many potential students' decisions whether to enroll. Much like some of the RCAs, while the Harvard College community may be for many students a self-contained and absorbing environment, students throughout their membership in the community maintain close external ties with family and friends outside the community. Similarly, the many divisions within the community—on the basis of House affiliation, class year, academic concentration, or extracurricular participation—work against the creation of the community-wide primary group that characterized the Oneida. Finally, while the ambition for a self-realization-friendly environment may be a collective one, to which the community as a whole aspires, the purpose behind that collective pursuit is nonetheless of an individualistic nature. In this sense, it may be stated that the shared value at the core of the Harvard College community falls somewhere between the group-oriented *gemeinschaftian* values of Oneidan Perfectionism and Amish *Gelassenheit*, and the *gesellschaftian* individualism and instrumentalism of the RCAs.

If the previous Sections of this paper have provided any guidance at all, it should come as little surprise that, just as the shared values of the Harvard College community synthesize the predominant qualities of the Section I communities and the RCAs, so too does Harvard's Administrative Board represent a similar synthesis of those communities' respective social control mechanisms. The procedures of the Administrative Board contain some formal qualities—an explicit, precedent-based procedure with numerous safeguards for the rights of students charged with violations—found in the RCAs' external mechanism. Similarly, the absence of student participation on the Administrative Board is far more similar to the external procedures of the RCAs than the internal and highly participatory processes of the Oneida and Amish. Yet, at the same time, the Administrative Board is in many respects informal. For example, the Harvard Administration places explicit emphasis on the following: (1) warnings and admonishments; (2) the process's educational possibilities for transgressing students; and (3) through the creation of the Student-Faculty Judicial Board, the possible inclusion of students in any

determination with likely implications for future perceptions of community standards. Thus, as was shown to be the case in each of the communities considered previously, the core values of Harvard College are in a symbiotic relationship with the principles and procedures of the community's social control mechanism. Just as the Administrative Board's blend of formal and informal qualities, with their mixture of individual rights-based and group-based orientations, feeds off the similar mixture of *gemeinschaft* and *gesellschaft* relations within the community, so too is this combination of community characteristics and shared values affirmed and reaffirmed by the social control function of the Administrative Board. In short, Harvard College, in both its underlying shared values and its mechanisms for social control, represents a synthesis of the *gemeinschaft* and *gesellschaft* orientations dominant in the Section I communities and the RCAs, respectively.

V. SECTION IV

A. *The Dangers And Limits Of Community*

Before concluding, and in light of the numerous instances throughout this paper in which I chose to sidestep the issue of the potential dangers of community social control to members' individual rights and integrity, I would like to take this opportunity to consider this very important matter. In considering these dangers, it seems most useful to ask the question: What ought to be the role of the state (either formally, as government, or informally, as a nation-wide community) in monitoring community social control functions of the various types of communities considered in this paper? To make this assessment, we must first try to understand, from the viewpoint of the individual member, the natures of the potential dangers present in each community, and then balance our responsibility to account for these dangers with a need to respect, from the perspective of the group, the unique qualities of the communities, and their desires for isolation, insularity, and autonomy.

From the perspective of concern for individual group members, it seems an impossible task to monitor each and every instance of internal social control. A far more reasonable way to approach the issue, then, is to attempt to monitor members' abilities, where they feel they have been deprived of their rights, either to externally seek redress or simply leave the community. In this regard, perhaps the most significant risks presented are the barriers to exit discussed on several occasions throughout this paper. Where affective, moral and instrumental orientations towards the group are strong, it would seem, these ties can create a reliance and dependence on the community, its beliefs and its membership, often preventing unhappy or dissatisfied members from ever leaving.

Where affective orientations are strong—where, as was seen among the Oneida, ties between members represent most or, perhaps even all, of a member's interpersonal relations—a member considering exit is faced with a wholly unfamiliar outside world, with no relations to contact or ask for help. What is more, where such a member has spent his or her entire life in the community, he or she will likely (depending on the extent to which the community's customs, practices and standards of behavior deviate from the outside world) have a difficult time interacting with and relating to people outside the community.¹⁵⁰ Though there are many factors that

¹⁵⁰Recall that this concern for child-members born into the community cut to the heart of the debate in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). A similar example can be found

might contribute within a given community to a heightened (and perhaps potentially dangerous) affective orientation, of those considered most carefully in this paper, it would seem that the combination of isolation and communalism would have a particularly strong effect. Where members of the community feel a sense of interdependence and interconnectedness with each other, and where the community-circle overlaps with few other community-circles, members are likely to feel dependent on membership, and thus less likely to feel capable of exit. Additionally, as was seen in both the Oneida and Amish, where Community boundary-control mechanisms rely on informal social pressure—where the ordinarily *gesellschaftlich* function of social control is infused with *gemeinschaft* relations—affective ties, and thus affective barriers to exit, are intensified.

Moral barriers to exit may be understood as a member's inability to leave the community because of a belief, taught and practiced fervently within the community, in the community's moral, ethical or religious superiority. Where a community teaches its members that their own belief system, pattern of behavior, membership or way of life is superior to, or at least extremely different from, that of the outside world, individual members will, one imagines, be less inclined to leave the community, even where they feel they are being treated unfairly or cruelly by the community. For example, the Oneidan notion of Perfectionism, which instilled in members a belief that the nature of their community was more amendable to a sin-free, godly life than the outside world, likely made members' decisions to exit the Community into that corrupt, inferior outside world far more difficult. Further, as was true to an extent with both the Section I communities, where insularity and intense isolation are central to a community's ideology—such that intermingling at all with non-members is discouraged or banned—moral barriers are intensified and members become increasingly disabled from choosing to exit their communities.¹⁵¹

The spectrum of barriers that might be considered instrumental is more of a catch-all; aside from those barriers affective or moral, it is (1) all of the required skills, knowledge, and abilities for a successful existence in mainstream society that are not provided, for one reason or another, in a particular community; and (2) the detrimental consequences of leaving the community, which, for an individual member would militate strongly against exit. Possible examples of this first sort of

among ultra-Orthodox Jewish communities, where very stringent restrictions exist regarding interactions between unrelated men and women. It is not hard to imagine how difficult it might be for a person having grown up in such a community to leave the community and be able successfully and meaningfully to interact with and relate to people in mainstream society.

¹⁵¹For example, in many of the RCAs, where there is a sense that the RCA-as-gated-community is a safe haven from the crime and danger of the outside world, members are probably less inclined to venture outside the RCA gates. Thus, we see that these moral barriers can easily lead to and blend into affective barriers as well. Yet, while insularity is often intertwined with the moral/ethical superiority or individuality discussed in the text just above, the two are not necessarily the same thing. For example, a community with a sense of moral superiority but without insularity might value proselytizing, which by definition would provide contact with non-members. For an interesting consideration of two ideologically fairly similar communities—the Satmar and Lubavitch Hassidic Jews—differing in large part on the basis of their opposing views of interaction with outsiders and proselytizing, see the following: ROBERT EISENBERG, *BOYCHIKS IN THE HOOD* (1998); ISRAEL RUBIN, *SATMAR: AN ISLAND IN THE CITY* (1972); Stephen Sharot, *Hasidim in Modern Society*, in *ESSENTIAL PAPERS ON HASIDISM* (Gershon David Hundert ed., 1991).

instrumental barriers often stem from differences from mainstream society in academic curriculum or discouragement of the use of technology or modern communication or transportation. Thus, a person born into Amish society, having little or no knowledge of computers, automobiles and the like, would find life outside his or her community far more difficult—and thus would face a much more extensive litany of instrumental barriers to exit—than would a person having been born into an RCA. Examples of the second, related type of instrumental barriers may be found at Harvard College. In light of the at least partially instrumental and preparatory nature of the community, and the potentially drastic repercussions of exit from it, particularly where mandated by the administration as dismissal or expulsion, students will perceive a strong instrumental barrier to exit (or any behavior jeopardizing their good standing as community members.)

With respect to the question of the role of the state in monitoring the individual rights of community members, two potential instrumental insufficiencies in particular deserve additional consideration: (1) the ability of individuals in a community to self-monitor their own rights, and whether those rights are being respected by the community; and (2) where those rights are not being sufficiently respected, their ability to secure external aid in seeking redress. In both cases, as is also likely for most of these barriers generally, there is a connection between the presence of these dangers (i.e. inabilities either to self-monitor or to seek redress) and intense isolation. It would seem that where *gemeinschaft* relations predominate, where social pressure is intense, and where community ideology emphasizes humility and a group-first mentality (for example, in the Oneida Community), individual members would likely be less able or willing to consider the status of their own individual rights. Similarly, to the extent that this sort of social control process differs so radically from the more individualistic, formal, procedural, rights-based social control processes of mainstream society, even where a members is aware of the deprivation of his or her rights, external assistance through the courts, for example, may be insurmountably uncomfortable and alienating for the individual. Particularly where community members are not made familiar with the origins of their rights (the Constitution, Federal law, etc.), or with the processes of the law, the dangers of these inabilities are likely to lurk.¹⁵² It may be said, then, that the presence and degree of these particular inabilities/barriers are likely proportional to the degree to which a community's deviance control processes (1) are informal; (2) promote insularity and internal resolution; (3) rely on and perpetuate *gemeinschaft* relations and social pressure; (4) differ in style and format from mainstream processes; and (5) rely on and promote a group-first mentality. It is these five considerations, from the perspective of the individual member—ffective barriers, moral barriers, instrumental barriers, ability to self-monitor, and ability to secure external aid in seeking redress—that support state involvement in the monitoring of individual rights of members of discrete communities.

¹⁵²With these considerations in mind, it seems clear that RCAs, which tend to be less isolated and to have social control processes not unlike (and indeed relying on) the external legal system, pose far less of a danger to the rights of individual members. This is probably also true for the Harvard College community, though, due in part to the youthfulness of members and the likely increased level of affective ties and *gemeinschaft* orientations, probably to a somewhat lesser extent.

Yet, as the reader has likely recognized in reading this section, it is many of the same characteristics here considered as potential dangers that are described in the earlier sections with a far more respectful and appreciative tone. Indeed, where in this section various characteristics and orientations are described as “barriers,” in previous sections these same qualities are presented as the reasons why people decide to become, and to remain as, members. It is precisely these characteristics that communities rely on as the driving force behind their social control processes. This is indeed the crux of the issue: many of the qualities, beliefs, and behaviors that make these communities unique, and upon which their very notions and self-definitions of community and identity rest, are at the same time precisely those held up by outsiders as causes for alarm. Without isolation, the Amish would likely have dissolved into mainstream culture; without communalism, the Oneida Community would have lost its unique attraction. Without a common goal or a collective ideal of a liberal academic community, RCAs and Harvard College would be without a motivating purpose. And without relying on these characteristics, each respective community’s deviance control mechanism would be essentially stripped of its ability to reinforce the defining outer boundary of the community-circle. In short, it is to a certain degree the very autonomy and independence from the state that allows communities to define themselves, to attract and perpetuate membership, and to forge the types of positive affective, moral and instrumental orientations that we celebrate as the blessings of community. The challenge for the state, then, is to consider both the needs of communities—to perpetuate their traditions, practices, relations and beliefs—and the rights of individual members.

VI. CONCLUDING REMARKS

We have now explored four different communities. We have considered the depth of identity formed around the small, isolated, and highly interconnected communities in Section I. And we have examined the more individualistic nature of RCAs. We have compared these two types of communities along two axes: (1) from the perspective of the community as a whole, the relative prominence of *gemeinschaft* and *gesellschaft* relations; and (2) from the perspective of individual group members, the existence of instrumental, affective, and moral orientations towards the group. In both instances, we have found the Section I communities at one end of each spectrum and the RCAs on the other. Further, we have seen how, in regards to both of these axes, the Harvard College community is something of a synthesis of the Section I communities and the RCAs. Hopefully, in comparing these four quite different forms of community, we have begun to understand what is at the core of these community-tubes, drawing people together in commonality.

We have also seen how each of these communities has a unique device for social control, protecting the community and its shared belief, values and/or goals from corruption from within and infiltration from without. From the internal, informal, participatory, group-oriented devices found within the Section I communities, to the formal, external, rights-based processes of the RCAs, to Harvard College’s synthesis of these two extremes, we have seen how a community’s social control mechanisms can work to reaffirm and perpetuate the core principles and behaviors at the heart of the community. Thus it is that social control forms a community-tube’s perimeter boundary.

Finally, we have considered the dangers and limits of community. We have seen how, in much the same ways that these communities forge unique identities, attract

membership, and control deviance within their communities, they also can potentially jeopardize the individual rights and integrity of their members. Where there are strong affective, moral, and instrumental barriers, and where members are not sufficiently able either to monitor their own rights or to secure external assistance in seeking redress, there is great reason for concern. Thus it is our responsibility, formally as government and informally as a nationwide community bound by a collective ideology and national conception of rights, to balance communities' needs for autonomy and independence with community members' individual rights.

It has been my contention throughout this paper that a community-tube is the result of a symbiotic relationship between two aspects: it is the core of shared values, beliefs, goals, and patterns of behavior, working to inform the perimeter's social control function; at the same time it is the mechanism for social control, through its continual definition and redefinition of acceptable values, beliefs and behaviors, affirming and reaffirming the commonalities and shared identities that form the heart of the community. Without a core, there is nothing for the outer barrier to protect, and without a perimeter there is no boundary to define the outer limits of acceptability. Yet, the mere presence of these two features is not sufficient; they must work harmoniously together, each feeding off of each other. Mutual criticism would have disastrous effects in an RCA, and likely even among the Amish. Similarly, contract-based litigation would be destructive if relied on by the Oneida Community, or even by Harvard College.

It may well be true that today's cross-section out of the community-tube model is a more complicated picture than what may have been the case a hundred years ago. With global transportation and communication at our fingertips, we are surely less isolated than ever before. We can join chat groups with faceless others on the internet, work for global corporations, and maintain personal contacts with friends around the world. If nothing else, our community-tubes are no longer strictly geographically defined. Yet, I do not believe this is an indication of a lack of community. Rather, it is but another step along our ever-evolving conception of what community is. There are an infinite number of possible communities, based on an equally infinite variety of underlying shared principles, beliefs and goals, no two communities the same and no single one necessarily remaining constant over time. Where there is a symbiosis of such commonality at the core, and controlling mechanisms at the outer limits, I believe there also exists a tube of community possibility.